84-1555

No.____

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In The Supreme Court
OF THE
United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America; WOODWARD SAND COMPANY, INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,
Appellees.

On Appeal From A Three Judge Court Of The United States District Court For The Central District of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. By requiring payments of "withdrawal liability" to a multiemployer pension trust from an employer who has no further contractual obligation to the pension trust, does the Multiemployer Pension Plan Amendments Act of 1980 [29 U.S.C. § 1381(a), *et seq.*] take the private property of the employer for the private use of the pension trust in violation of the Taking Clause of the Fifth Amendment of the Constitution?

2. If the property taken from the employer by § 1381(a) is for a public use, is the property taken without just compensation in violation of the Taking Clause of the Fifth Amendment?

3. If the provisions of § 1381(a) imposing withdrawal liability are void under the Taking Clause, are the provisions of 29 U.S.C. §§ 1306-1307 requiring payment of premiums from the appellant Pension Trust to the appellee agency invalid, either because inseparable from § 1381(a) or because the remaining statutory design would violate the Due Process Clause of the Fifth Amendment?

4. Is the appellant Pension Trust excused from paying "premiums" to PBGC under Title IV of ERISA as enacted in 1974 [29 U.S.C. §§ 1301-1381; 88 Stat. 1003-1035] either because the statute is so irrational with respect to multiemployer pension plans as to be a violation of the Due Process Clause of the Fifth Amendment, or because the statute violates the Separation of Powers principle of the Constitution by delegating legislative discretion to determine the use of funds collected?

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Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America; WOODWARD SAND COMPANY, INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,
Appellees.

On Appeal From A Three Judge Court Of The United States District Court For The Central District of California

JURISDICTIONAL STATEMENT

John L. Connolly, et al.,[1] the appellants, appeal from the Judgment of the Three Judge Court convened in the

[1]All parties to the proceeding in the district court are listed as follows: John L. Connolly, C. V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H.

United States District Court for the Central District of California entered December 4, 1984, holding that certain federal statutes are constitutional and denying a permanent injunction against enforcement of such statutes.

OPINIONS BELOW.

The Order Granting Summary Judgment To Defendant filed by the Three Judge Court of the U.S. District Court for the Central District of California on May 1, 1984, appears in the appendix at page 1, and is not officially reported. The Order Granting Summary Judgment to plaintiffs filed by the district court on February 12, 1976, is reported at 419 F.Supp. 737 and appears in the appendix at page 42. The opinion of the U.S. Court of Appeals for the Ninth Circuit reversing summary judgment for plaintiffs and remanding is reported at 581 F.2d 729 (1978) and appears in the appendix at page 30. This Court denied plaintiffs' petition for a writ of *certiorari* as reported at 440 U.S. 935 (1979). The Order Re Three Judge Court filed by the district court on September 13, 1979, is not officially reported and appears in the appendix at page 28. The order of the Ninth Circuit summarily denying a petition for writ of mandamus filed by plaintiffs seeking review of the Order Re Three Judge Court is not officially reported and appears at page 27 of the appendix. The order of this Court similarly denying plaintiffs' petition for writ of mandamus is reported at 445 U.S. 959

Seymour, Richard L. Corbit, Harold Edwards, Donald E. Meyer, William C. Waggoner, Richard Gannon, and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, plaintiffs; Pension Benefit Guaranty Corporation, a nonprofit corporation established within the Department of Labor of the United States of America, defendant; Woodward Sand Company, Inc., Penfield & Smith, Inc., Klema Engineering, Inc., and Municipal Engineers, Inc., plaintiffs-in-intervention.

(1980) and appears at page 26 of the appendix. The opinion of the Ninth Circuit reversing and remanding the district court with directions to convene a Three Judge Court is reported at 673 F.2d 1110 (1982) and appears in the appendix at page 17.

JURISDICTION.

Appellants ("Trustees") filed this action June 17, 1975, pursuant to 29 U.S.C. § 1303(f) to recover amounts paid as "premiums" to appellee Pension Benefit Guaranty Corporation ("PBGC") and for a declaratory judgment pursuant to 28 U.S.C. § 2201 holding the pension plan ("Plan") administered by the Trustees to be a "defined contribution plan" outside the jurisdiction of PBGC. Alternatively, if the foregoing relief were denied, the action sought a determination that Title IV of ERISA [29 U.S.C. §§ 1301-1381; 88 Stat. 1003-1035] was unconstitutional and a permanent injunction restraining PBGC from enforcing the statute with respect to the Plan. The constitutional issues and the availability of injunctive relief were required to be heard and determined by a district court of three judges pursuant to 28 U.S.C. § 2282.

The judgment of the Three Judge Court denying a permanent injunction against enforcement of the federal statute in this action was entered on December 4, 1984. On December 17, 1984, PBGC filed a motion to alter or amend the judgment in respects which are of no import to the matters to be dealt with on this appeal. The Trustees filed a notice of appeal in the district court on January 31, 1985, within the time permitted by 28 U.S.C. § 2101(b). After the District Court denied PBGC's post-judgment motions for attorney's fees by order filed March 15, 1985.

This Court has jurisdiction under 28 U.S.C. § 1253 to determine this appeal from the final judgment denying a

permanent injunction in a civil action required to be heard and determined by a district court of three judges.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

Fifth Amendment, United States Constitution:

> "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The challenged federal statutes are contained in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") and in the amendments of ERISA enacted by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The challenged statutes in their entirety are comprised of 29 U.S.C. §§ 1381-1405, §§ 1306-1307 and § 1461(c)(2) [formerly § 1381(c)(2)]. The essential statutory provisions are as follows:

29 U.S.C. § 1381(a) [94 Stat. 1217]:

> "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."

29 U.S.C. § 1382 [94 Stat. 1218]:

"When an employer withdraws from a multiemployer plan, the plan's sponsor, in accordance with this part, shall —

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer."

29 U.S.C. § 1307 [88 Stat. 1013; 94 Stat. 1298, 1300]:

"The plan administrator of each plan shall pay the premiums imposed by the corporation under this subchapter with respect to that plan when they are due . . ."

29 U.S.C. § 1461(c)(2) [formerly 29 U.S.C. § 1381(c)(2); 88 Stat. 1034; 94 Stat. 1267]:

"The corporation may, in its discretion, pay benefits guaranteed by this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before August 1, 1980, if —

(A) the plan was maintained during the sixty months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after July 31, 1980."

STATEMENT OF THE CASE.

The Trustees administer the Operating Engineers Pension Plan ("Plan") according to a written Agreement Establishing the Operating Engineers Pension Trust made in 1960 pursuant to § 302(c)(5) of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 186(c)(5)]. This labor-management Pension Trust receives contributions from several thousand employers under written collective bargaining agreements covering employees in the construction industry of Southern California and Southern Nevada. The employers periodically enter into collective bargaining agreements with the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), by which the employers agree to abide by the Trust Agreement and to pay certain contributions to the Pension Trust each month. The amount contributed by each employer is determined by multiplying the employees' hours of employment by an hourly rate specified in the collective bargaining agreement. Under the express terms of the Trust Agreement and the Plan, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust. This is true even though the contributions may be insufficient to pay the benefits described in the Plan. The benefits described in the Plan are established by the Trustees based on an actuarial estimate of the sufficiency of Trust assets to pay the benefits, and the Trustees retain authority under the Trust Agreement to adjust the benefits in light of actual experience and other actuarial considerations. *App., infra,* pp. 32-33 (581 F.2d at 731).

Because under the Trust Agreement and the Plan the employer promises only a fixed contribution, not a fixed benefit, the Trustees in 1975 sought an administrative ruling by PBGC that the Plan is a "defined contribution plan" excluded from PBGC's jurisdiction by the statute. PBGC ruled that the Plan is a "defined benefit plan" and claimed the right to receive payments of annual "premiums" from the Pension Trust. This action by PBGC had the effect under the statute of treating contributing employers of the Pension Trust as liable for "employer contingent liability" in amounts as much as 30% of the employer's net worth if the Plan were to terminate with insufficient assets to pay the benefits described in the Plan.

The Trustees filed this action on June 17, 1975, seeking recovery of the "premiums" paid to PBGC and a determination that the Plan was a "defined contribution plan" under the statute. Alternatively, the Trustees' complaint sought a permanent injunction against enforcement of the statute on grounds that the statute takes the property of the Pension Trust and its contributing employers in violation of the Due Process Clause and the Taking Clause of the Fifth Amendment and unconstitutionality impairs the contract rights of the Trustees, the employers, Local 12 and the participants of the Plan. On February 12, 1976, the District Court granted summary judgment to the Trustees on grounds that the Plan is properly regarded as a "defined contribution plan" particularly because the employer has promised no "fixed benefits" and to do otherwise would be "to force upon the employer a greater obligation and liability than he had agreed to in his contract." *App.*, pp. 49, 50 (419 F.Supp. at 740, 741). On appeal, the Ninth Circuit reversed, based upon statutory interpretation to the effect that "[t]he precise intent of [the federal statute] was to

impose substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan." *App.*, p. 35 (581 F.2d at 732). This Court denied the petition for *certiorari* filed by the Trustees. 440 U.S. 935.

On remand, the district court declined to convene a three judge court on grounds that the constitutional issues raised by the Trustees were insubstantial, citing a 1947 decision of this Court involving a challenge of the Home Owner's Loan Act of 1933. *App.*, p. 29. Following summary denials of the Trustees' petitions for writ of mandamus in the Ninth Circuit and this Court, on appeal the Ninth Circuit reversed and remanded with directions that a three judge court be convened to determine the substantial constitutional questions raised. *App.*, p. 25 (673 F.2d at 1114).

During the litigation to convene a three judge court, ERISA was amended by MPPAA to create "withdrawal liability," by which an employer whose contract obligation to pay contributions to the Pension Trust had ceased would be required to pay to the Pension Trust amounts calculated in accordance with the statute. On remand from the second appeal, the district court requested that a three judge court be convened on June 21, 1982. The Trustees filed an amended complaint addressing the amended statute on August 16, 1982. By order filed December 14, 1982, four employers whose collective bargaining agreements had been terminated and who had received notifications from the Pension Trust of withdrawal liability claims as required by the statute, were granted leave to intervene in the action.[2]

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[2]The intervening employers were Woodward Sand Company, Inc., Penfield & Smith, Inc., Klema Engineering, Inc., and Municipal Engineers, Inc., designated as plaintiffs-in-intervention in the district court and as appellees herein pursuant to Rule 10.4.

The Trustees' amended complaint challenged the amended statute imposing "withdrawal liability" on employers whose contractual obligations to the Pension Trust had ceased on grounds that the statute takes the private property of the employers for the private use of others and provides no compensation for the property taken. In addition, the amended complaint maintained the challenge of the original statutory requirement of "premium" payments to PBGC and further contended that the Due Process Clause is violated by the amended premium requirements when the "withdrawal liability" provisions are excised from the statute.

The Trustees filed a motion for summary judgment on May 13, 1983, and the intervening employers filed a parallel motion for summary judgment on May 16, 1983. The Trustees contended that the statutory imposition of "withdrawal liability" on employers whose contract obligations to the Pension Trust had ceased would be a taking of private property for private use, and would be taking property without compensation, in violation of the Taking Clause of the Fifth Amendment. Further, the Trustees contended that the statutory provisions requiring payment of "premiums" by the Pension Trust to PBGC violate the Due Process Clause both before and after the 1980 amendments of the statutory scheme and, finally, that the statutory design for collection and expenditure of "premiums" by PBGC for coverage of plans terminated prior to the 1980 amendments violated the principle of Separation of Powers by delegating legislative authority to PBGC to determine the use of the funds.

The duly convened Three Judge Court heard oral arguments on the motions for summary judgment on October 24, 1983. On May 1, 1984, the Three Judge Court filed an Order Granting Summary Judgment To Defendant holding the statute to be constitutional and denying injunctive

relief. In disposing of the Trustees' contentions that the "withdrawal liability" statute takes property from the withdrawn employer and gives the property to the Pension Trust for private use without compensation to the employer, the Three Judge Court saw no need to determine whether the statutory use of property was public or private, or whether the "taking" was compensated. Instead, the Three Judge Court concluded "that no 'property' was involved in this case" based on reasoning that "the contractual right which insulates employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the Takings Clause." *App.*, pp. 7-8. Regarding the Due Process Clause issues, the Three Judge Court summarily concluded that the statutory provisions existing between 1974 and 1980 were rational, and reached the same conclusion regarding the amended statute after further analysis. Finally, the Three Judge Court declined to reach the merits of the Separation of Powers issue on grounds that the issue became moot upon amendment of the statute in 1980. Judgment was entered on December 4, 1984. Post-judgment motions filed by PBGC on December 17, 1984, and January 7, 1985, seeking an award of attorney's fees against the intervening employers were denied by order filed March 15, 1985.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

1. WHETHER CONGRESS MAY TAKE PRIVATE PROPERTY FROM ONE PARTY AND GIVE IT TO ANOTHER FOR PRIVATE USE IN THE GUISE OF "REGULATING" A FULLY PERFORMED AND EXPIRED CONTRACT, WITHOUT COMPENSATING THE PARTY FROM WHOM THE PROPERTY IS TAKEN, PRESENTS ISSUES OF FUNDAMENTAL IMPORTANCE.

In *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, — U.S. —, 104 S.Ct. 2709 (1984), this Court held that Congress did not violate the Due Process Clause by adopting a retroactive effective date for the MPPAA because the reasons for using a retroactive effective date were "eminently rational." *Id.*, S.Ct. at 2718.[3] That decision leaves unanswered whether a federal statute may create monetary obligations which would not otherwise exist between two private parties without violating the Taking Clause of the Fifth Amendment.

> "[H]owever 'rational' the exercise of [legislative] power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *United States v. Security Industrial Bank*, — U.S. —, 103 S.Ct. 407, 410 (1982).

In *Security Industrial Bank*, the Court declined to accept the government's characterization of a statute as "general economic regulation which in effect transfers the property interest [in liens against personal property]

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[3]For purposes of the *R. A. Gray* decision, the Court assumed, without deciding, "that the prospective effects of the Act satisfy constitutional standards." *Id.* 104 S.Ct. at 2717, n. 7.

from a private creditor to a private debtor," rather than as "taking" property. *Id.*, 103 S.Ct. at 412.

Whether a governmental action goes beyond "regulation" and effects a "taking" involves several identified factors, including "the character of a governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, ___ U.S. ___, 104 S.Ct. 2862, 2875 (1984). The essence of the federal action in this case caused one private citizen (an employer) to transfer property (money) to another private party (a pension trust). The economic impact of this "taking" is highly significant to the deprived party, since the withdrawal liability claim may exceed the net worth of an employer as a going concern (although such a claim against an employer in bankruptcy or liquidation may be limited between 30% and 80% of net worth). 29 U.S.C. § 1405. The employer's "reasonable investment-backed expectation" is that, after paying his just debts and fully performing his contract obligations, his property will remain his own, free of governmental action requiring its transfer to another party.

In *Ruckelshaus v. Monsanto Co., supra,* the Court recognized very broad authority on the part of Congress to determine whether property taken by statute is for a "public use." *Monsanto,* 104 S.Ct. at 2879. Nevertheless, some limit must exist on congressional authority to declare a "public use" or the constitutional requirement of a "public use" has no meaning. Moreover, while the public may have a broad range of interest in the ownership and use of particular property, *e.g.,* real estate or pesticides, *the Taking Clause should not permit Congress to have an interest in determining which of two private citizens owns money.* The Taking Clause was intended to protect minority factions (such as employers) from oppression at the

hands of a Congress influenced by majoritarian interests. The essence of that protection bars Congress from requiring one citizen to transfer his wealth to another citizen.

The taking of property effected by the withdrawal liability statute cannot be permitted to pass as a mere economic regulation of private contractual relations. The "conduct" of the employer giving rise to the statutory transfer of property is the employer's failure to undertake new contractual obligations when his existing agreement expires. Withdrawal liability then arises under the statute based on Pension Plan benefits previously adopted by the Trustees as independent fiduciaries outside the control of any contributing employer. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-334, 101 S. Ct. 2789, 2794-96 (1981). The parties to the collective bargaining agreements and the Trust Agreement in this case created clear and unambiguous obligations which are fully performed when the agreements expire. If Congress has power to use such a contractual relationship as a basis for requiring transfer of property between private citizens, then Congress might similarly use other societal relationships as the regulated *nexus* giving rise to a statutory duty to transfer property to the favored private party. The Taking Clause was specifically intended to protect minority interests from such oppression by Congress, since " . . . a law that takes property from A. and gives it to B. . . . is against all reason and justice." *Calden v. Bull,* 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798).

The right to acquire and own property without fear of governmentally imposed forfeiture is still the personal freedom most fundamental to a flourishing democratic society [*see* M. Novak, *The Spirit of Democratic Capitalism,* pp. 83-84, 183, 175 (American Enterprise Institute/Simon & Shuster, 1982)], and is a key limitation on the power of the state over the individual. *Id.,* pp. 244,

307, 325, 397 (n. 14). The protection of this precious freedom by the Taking Clause will have become hollow, indeed, if the worth accumulated over a lifetime by one enterprising citizen can be taken by federal edict and given to others.

Even if the taking of property is for a public use, the MPPAA provides no compensation to the employer for the property taken. Although the MPPAA does not expressly withdraw the availability of a Tucker Act remedy for the employer, such a withdrawal of jurisdiction may be inferred by implication from the considerations that Congress would not wish to open the federal treasury to liabilities for privately created pension benefits and, if Congress wished to do so, the federal payments would likely have been made directly to the pension plans rather than by first taking property from the employer. *Cf., Monsanto,* 104 S.Ct. at 2881-82.

2. IF THE IMPOSITION OF "WITHDRAWAL LIABILITY" IS INVALID UNDER THE TAKING CLAUSE, THE REMAINING PROVISIONS OF THE MPPAA REQUIRING PAYMENT OF "PREMIUMS" TO PBGC SHOULD BE STRICKEN AS INSEPARABLE OR AS FAILING TO SATISFY THE RATIONALITY REQUIREMENT OF THE DUE PROCESS CLAUSE.

PBGC declared to Congress in 1979 that, without the use of property to be taken from employers as "withdrawal liability," the annual "premium" to be paid by multiemployer pension plans to PBGC would likely be in excess of $80.00 per employee participant rather than $1.40 per employee participant as enacted into law. Such a high "premium" would have been a severe drain of assets from healthy multiemployer plans. Rather than establish such a costly centralized "insurance" scheme,

Congress likely would have chosen a more moderate approach to securing the stability of pension benefits by further regulating the design and funding of benefits under multiemployer plans. Thus, Congress would not have enacted the premium provisions of the statute independently of the withdrawal liability provisions. *Cf., Buckley v. Valeo,* 424 U.S. 1, 108, 96 S.Ct. 612, 677 (1976). ERISA enacted in 1974 contains a severability provision, 29 U.S.C. § 1139, but the MPPAA does not. The remaining provisions of ERISA could continue to be "fully operative as a law," *I.N.S. v. Chadha,* —U.S. —, 103 S.Ct. 2764, 2775 (1983), but the "premium" collection provisions and withdrawal liability provisions affecting multiemployer pension plans enacted in 1980 are integrally related parts of the same "termination insurance" statutory scheme. Accordingly, the "premium" collection provisions enacted in 1980 should be stricken, either as an inseparable part of the statute invalidated under the Taking Clause, or because the premium statute fails the rationality test under the Due Process Clause when the withdrawal liability provisions are stricken.

3. THE "PREMIUM" STATUTE ENACTED IN 1974 VIOLATES THE DUE PROCESS CLAUSE AND THE SEPARATION OF POWERS PRINCIPLE THROUGH ITS EFFECTS ON MULTIEMPLOYER PENSION PLANS.

The 1974 coverage of Title IV of ERISA was enacted after wholly insufficient prior study of multiemployer plans and, as a result, the statute had highly destructive and uncertain effects upon the continued financial stability of such pension plans. The Due Process Clause should require more than merely that the action of Congress be capable of articulation in a "rational legislative purpose." *Cf., P.B.G.C. v. R. A. Gray & Co., supra,* 104 S.Ct. at 2718. Due process should encompass at least a minimum

standard of reasoned deliberation and understanding before legislation is enacted. Congress is not entitled to act arbitrarily and capriciously, even in the pursuit of a legislative purpose that is capable of later rationalization. Otherwise, individual rights may suffer permanent damage in ways which are not remedied by later functioning of the democratic process.

Moreover, the absence of prior study and understanding in ERISA's enactment resulted in a legislative delegation of authority to PBGC to use the funds collected as "premiums" without an "intelligible principle" for guidance. 29 U.S.C. § 1381(c), 88 Stat. 1035. Under the statute, PBGC was given discretion to pay benefits to participants of a terminated multiemployer plan so long as: (a) the plan had been in existence five years or more, (b) PBGC could determine that such payments would not "jeopardize" PBGC's ability to pay benefits which were later to become mandatory, and (c) reports of such discretionary actions were made to the responsible committees of Congress. Having no "intelligible principle" to control the use of funds, this statute is a forbidden delegation of legislative power. *Hampton & Co. v. U. S.*, 276 U.S. 394, 409, 48 S.Ct. 348, 352. Such "sharing" of legislative and administrative authority between PBGC and the congressional oversight committees does not comprise enactment of legislation "by the national Congress in [a] step-by-step, deliberate and deliberative process" as required by the Separation of Powers principle. *I.N.S. v. Chadha, supra,* 103 S.Ct. at 2788. The Three Judge Court declined to reach this issue on grounds of mootness resulting from amendment of the statute, but the issue is by no means moot when the Trustees continue to contest the payment of "premiums" claimed by PBGC under the 1974 statute and, in addition, the amended statute contains the same delegation of legislative authority with respect to expenditure of funds on behalf

of plans terminated before August 1, 1980. 29 U.S.C. § 1461(c)(2), 94 Stat. 1267.

CONCLUSION.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

United States District Court
Central District of California
Three Judge Court
No. CV-75-2037-DWW

John L. Connolly, et al., etc.,
Plaintiffs,
vs.
Pension Benefit Guaranty Corporation, etc.,
Defendant.

Woodward Sand Co., Inc.;
Penfield & Smith, Inc;
Klema Engineering, Inc.; and
Municipal Engineers, Inc.
Plaintiffs in Intervention.

[Filed May 1, 1984]

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

Before: NELSON, Circuit Judge, and WILLIAMS and KELLEHER, Senior District Judges.

Plaintiffs, as Trustees, ("Trustees") of the Operating Engineers Pension Trust ("Pension Trust"), a joint labor-management employee benefit trust created pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 [29 U.S.C. § 186(c)(5)], seek summary judgment against defendant Pension Benefit Guaranty Corporation ("PBGC") to the effect that certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), violate the Constitution

of the United States. In particular, the Trustees contend that the provisions of the MPPAA imposing "withdrawal liability" on employers who ceased participation in the Pension Trust violate the fifth amendment of the Constitution by requiring private property to be transferred from one party to a second party for the second party's private use and benefit. In addition, the Trustees contend that the provisions of ERISA, as originally enacted and amended, requiring payments of "premiums" by the Pension Trust to PBGC, failed to accord the due process of law guaranteed by the fifth amendment.

Actions seeking to enjoin the operation of acts of Congress were, until 1976, required to be heard by district courts with three judges on the panel. Since this lawsuit was begun in 1975, it is properly before this three-judge court. *Connolly v. Pension Benefit Guaranty Corp.*, 673 F.2d 1110, 1113-14 n.l (9th Cir. 1982).

There are no factual issues in dispute in this case. The date of intervenors' withdrawal from the pension plan is not relevant because intervenors do not challenge the retroactive application of the MPPAA. Such a challenge was rejected in *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), *prob. juris. noted sub nom PBGC v. R.A. Gray & Co.*, 52 U.S.L.W. 3308 (Oct. 18, 1983) (hereinafter *"Shelter Framing"*). Moreover, this lawsuit challenges the facial constitutionality of Title IV and the MPPAA and does not challenge the statute as applied to particular persons. Hence, allegations regarding the particularized impact of the challenged legislation on the parties' individual situations are of little relevance. We find that no triable issues of fact exist and, for the reasons set forth below, grant defendant's motion for summary judgment.

BACKGROUND

In 1974, Congress attempted to regulate pension plans in a comprehensive manner.[1] To do so, it enacted the Employee Retirement Income Security Act. Title IV of ERISA was adopted to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds. To achieve this goal, it established a system of termination insurance. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 951 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980). This termination insurance program is run by the PBGC. The PBGC is a governmental entity which receives no direct federal appropriations. Instead, it relies primarily on premium payments from private parties to insure against the failure of pension funds.

Upon enactment of ERISA in 1974, the PBGC immediately insured the receipt of all "non-forfeitable benefits" that had been earned by employees in single employer plans. A single employer who wished to terminate his plan was thus first required to notify the PBGC. 29 U.S.C. § 1341(a) (1976). If an investigation subsequently revealed that the plan lacked sufficient assets to pay its "non-forfeitable benefits," the PBGC itself became obligated for the shortfall. *Id.* at § 1342(c), (b).

Multiemployer plan benefits, in contrast, were not insured unconditionally upon enactment, but rather were guaranteed solely at the discretion of the PBGC until January 1, 1978. At that time, the guaranties were to become mandatory. *Id.* at 1381(c)(1). In the interim, the PBGC was authorized to determine on a case-by-case

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[1]Our discussion of the legislative history of the MPPAA is adopted from the discussion set forth in *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. December 19, 1983) (hereinafter "*Peick*").

basis whether it would pay a terminating plan's beneficiaries the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* at § 1381(c)(2).

There were several reasons why Congress chose not to insure all multiemployer plan benefits immediately in 1974. Congress viewed multiemployer plans as more stable and secure than single employer plans and thus saw less need to insure the former. *See Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734 (9th Cir. 1978); 126 Cong. Rec. 12,179 (1980) (remarks of Rep. Biaggi). Moreover, Congress was concerned about the potential costs of such a program. Recognizing that it needed more time to study the entire problem, Congress delayed the effective date of the mandatory guarantee program and extended the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (1977). At the same time, Congress ordered the PBGC to prepare a comprehensive report analyzing the multiemployer situation.

After extensive consideration, the MPPAA was enacted, affecting a variety of major changes in ERISA. Under the MPPAA, the PBGC is required to guarantee certain benefits of covered multi-employer plans. The level of benefits guaranteed by the PBGC under the MPPAA is lower than the level guaranteed prior to the passage of the MPPAA. The premiums employers must pay the PBGC for insurance are significantly higher under MPPAA. The PBGC is also authorized to provide financial assistance to plans which cannot meet their current financial obligations. This permits a plan which is having financial difficulties to continue, and allows employers to continue making contributions to an insolvent plan without incurring liability under ERISA. Under the MPPAA, the insurable event for a plan is its insolvency,

rather than its termination. The MPPAA further provides that the plan benefits are to be funded over a shorter period of time than formerly required and requires arbitration to resolve a wide variety of disputes between trustees and employers. Plaintiffs raise a number of constitutional challenges to the provisions of Title IV and the MPPAA.

DISCUSSION

A. THE TAKINGS CLAUSE.

Plaintiffs argue that contractual provisions creating investment backed expectations constitute compensable property rights just as much as actual ownership of property. Relying primarily on the recent Ninth Circuit case of *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted*, 52 U.S.L.W. 3342 (November 1, 1983), they argue that employers would normally be required to liquidate other property, such as land, to pay withdrawal liability claims.

Midkiff, on its face, suggests that it does not control the case before us. *Midkiff* insists that if it had been reviewing "a *congressional* determination that there was a public use, not . . . a state legislative determination," it might have reached a different result. 702 F.2d at 798. State legislative pronouncements, *Midkiff* concludes, are entitled to less deference than Congressional determinations. *Id.* Since the case before us, unlike *Midkiff*, involves a congressional finding, we could merely cite this analysis and move on. We choose not to do this, however, because to do so would be to endorse the *Midkiff* logic.

The *Midkiff* analysis seems inconsistent with what little Supreme Court precedent is available. The Supreme Court has never written that state legislative determinations are entitled to less deference than congressional

determinations. To make it seem othewise, *Midkiff* culls sentences from two unrelated cases, written 15 years apart, and stands them in juxtaposition. Thus, it offers this statement:

> when *Congress* has spoken on the subject 'Its decision is entitled to deference until it is shown to involve an impossibility'

T.V.A. v. Welch, 327 (1925) U.S. 546, 552 (1946), *quoting Old Dominion Land Co.*, 269 U.S. 55, 66 (1925), in contrast with this one:

> where a state legislative determination is involved: "[i]t is well established that . . . the question what is a public use is a judicial one."

Cincinnati v. Vester, 281 U.S. 439, 446 (1930), and concludes that state legislative findings are accorded little deference. 702 F.2d at 798. The Supreme Court did not intend, in either of these cases, to draw a line between state and federal legislative judgments. In fact, the quotation from *Vester* is equally applicable to Congress, and that from *T.V.A.* equally applicable to the states. Thus, *Midkiff* has created a distinction that the Supreme Court has never recongnized and has, in fact, implicitly rejected. *E.g., Berman v. Parker*, 348 U.S. 26, 31-32; *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680 (1896).

Moreover, common sense suggests that state legislative determinations, if they are to be treated differently than congressional determinations, should be granted more, not less, deference. The tenth amendment reserves power to the states. To at least one commentator, "it seems clear that the reserve power of the state in this area is greater than the power of the federal government when the federal government is acting within the boundaries of a

state." Conahan, *Hawaii's Land Reform Act: Is It Constitutional?* 6 Hawaii B.J. 31, 37 (1969). Thus, the distinction drawn in *Midkiff* between state and federal legislative findings seems an unlikely one.

The *Midkiff* distinction, however, is unnecessary to our holding here because we find that no "property" was involved in this case. Traditionally, it has been understood that to make a claim under the takings clause, the claimant must prove that "property," in the sense of "the group of rights inhering in the citizen's relation to [a] physical thing," has been "taken." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). There has been no "set formula" which the Supreme Court has evolved to determine when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government. . . ." Rather, the Court has examined the "taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors — such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action — that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

We find that the contractual right which insulates employers from further liability to the pension plans in which they participate is not "property" within the meaning of the takings clause. Although contractual rights may constitute property, *see Lynch v. United States*, 292 U.S. 579 (1934), they must be very explicit to do so. In both *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the parties sought to protect interest in real property. Here, in sharp contrast, we are asked to protect

a mere contractual arrangement. The importance of this distinction was reaffirmed by the Supreme Court in the recent case of *Security Industrial Bank v. United States,* __ U.S. __, 103 S. Ct. 407 (1983). Since appellants are unable to identify any interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans to which they participate, we find no property at issue in this case. We refuse to consider the contingent right to escape one's own liability, in derogation of statutory policies, as property under the takings clause. Accordingly, we find no constitutional violation. *See Peick v. Pension Benefit Guaranty Corporation,* No. 82-2081, slip op. at 53 (7th Cir. Dec. 19, 1983); *Dorn's Transportation Inc. v. I.A.M. National Pension Fund, Benefit Plan A,* No. 82-1141 (D.D.C. January 19, 1984) (hereinafter "*Dorn's*"); *Speckman v. Paddock Chrysler Plymouth, Inc.,* 565 F. Supp. 469, 472-73 (E.D. Mo. 1983). Since we resolve this issue on the basis of our finding that no "property" is affected by the MPPAA, we need not reach the questions whether a taking occurred or whether such a hypothetical taking would be for a public purpose.

B. DUE PROCESS ANALYSIS.

If they do not affect property, provisions of Title IV and the MPPAA may yet be unconstitutional if they are not grounded in a rational basis. Plaintiffs argue that Title IV and the MPPAA achieve the reverse of their intended results. Specifically, Title IV and the MPPAA increase pension plan terminations and disrupt pension plans in general. Thus, plaintiffs argue, these statutes fail the rational basis test.

The burden of proof is on the challenging party to prove that Congress has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15-16 (1976). Since the due process challenge here involves

only economic rights in general, this court merely must determine whether the statutes bear a rational relationship to their legitimate ends. *United States v. Carolene Products,* 304 U.S. 144 (1938); *Beller v. Middendorf,* 632 F.2d 788, 807-08 (9th Cir. 1980). We find that both Title IV and the MPPAA are founded in rational bases.

To assess the constitutionality of the withdrawal liability provisions of the MPPAA, we must apply the analysis first set forth by the Seventh Circuit in *Nachman Corp. v. PBGC,* 592 F.2d 947, 960-63 (7th Cir. 1979), *aff'd on other grounds,* 446 U.S. 359 (1980) (hereinafter *"Nachman"*). *See Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc.,* No. 83-7004 (2d Cir. Jan. 9, 1984) (hereinafter *"Textile Workers"*). Although much of the *Nachman* analysis is derived from contract clause considerations, those considerations are applied to the federal government through the due process clause. *See Shelter Framing,* 705 F.2d at 1510-11; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628 (4th Cir. 1983). *But see Dorn's,* slip. op. at 15. After pointing out that rationality is determined by comparing the identified problem to the nature and scope of the burden imposed to remedy it, the *Nachman* court considered four separate factors: 1) the reliance interest of the parties affected; 2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; 3) the equities of imposing the legislative burdens; and 4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. The court emphasized that these four factors were only to be used to determined whether the legislation represented a rational means to a legitimate end, but were not to be used to express judicial approval or disapproval of the balance struck by Congress. *See id.* We address each of these four factors in turn.

First, we must analyze the reliance interest of the parties affected by the statute. Intervenors insist that they have relied on a basic contractual agreement that they will not have to pay more to the pension plan than their original required contributions. In *Nachman,* the court found that the employees' reliance on receiving their vested benefits outweighed the employer's reliance on its ability to terminate its obligations without continuing liability. Concededly, *Nachman* involved a single employer plan, while the instant case involves multiemployer plans where the participants do not have specific promises from their own employers to pay their pension benefits. "It is nonetheless reasonable and fair to conclude that plan participants did expect their employers to continue making contributions necessary to support these expected benefits." *Textile Workers,* slip op. at 943. We conclude that the employers' reliance in their business dealings on their collective bargaining agreements is offset by employees' reliance in their personal affairs on obtaining vested pension benefits. The first *Nachman* factor does not weigh decidedly in favor of either party in this lawsuit.

The second *Nachman* factor is whether impairment of the private interest is affected in an area previously subjected to regulatory control. We find this factor to weigh heavily against the employers here. In *Nachman,* the court wrote that since plan terminations had previously been subject to federal regulation, an employer's expectation that it would not have to fund its plan's vested benefits could be given less weight by Congress. 592 F.2d 962. In that case, the presence of Internal Revenue Service regulations governing plan terminations mitigated *Nachman*'s claim of surprise when ERISA was enacted with termination liability provisions. *Id.* at 962, n.33. "Just as the employer in *Nachman* was charged with constructive notice that its rights might someday be subject to congressional regulation, so too were plaintiffs

here. Notice was everywhere." *Textile Workers,* slip op. at 945; *see Shelter Framing Corp. v. Pension Benefit Guaranty Corp.,* 705 F.2d 1502, 1512 (9th Cir. 1983) ("Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974.") Before the employers decided to close their operations, there had been decades of pre-MPPAA regulations of multiemployer plans under a variety of federal labor and tax laws. *See Peick,* 539 F. Supp. at 1044. "The enactment of ERISA in 1974 provided a comprehensive regulatory scheme mandating employer withdrawal liability in the single employer context." *Textile Workers,* slip op. at 945. This "afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created." *Peick,* 539 F. Supp. at 1044-45. (footnote omitted). Unlike *Shelter Framing,* we are not here addressing the effect of "legislative changes which extract a heavy fine for action taken *before* the changes win congressional approval." 705 F.2d at 1512 (emphasis added). Here, of course, the actions are taken *after* congressional approval. We find that the MPPAA's effect was not completely unexpected, and that Act operated in an area that Title IV had previously regulated. The second *Nachman* factor therefore favors the constitutionality of the MPPAA.

The third *Nachman* factor involves weighing the equities of imposing the burden of withdrawal liability on the employer. Here, intervenors insist that the MPPAA has radically changed the pension plan "ground rules" and unfairly burdens employers who withdraw from pension plans.

When drafting the MPPAA, Congress was forced to determine who should bear the burden of any shortfalls in a multiemployer plans. We cannot find it unreasonable for Congress ultimately to decide to require the withdrawing

employers to bear their share of the burden of funding, rather than to leave the remaining employers "holding the bag." *See* 126 Cong. Rec. 20,234 (1980) remarks of Senator Matsunaga).

The MPPAA itself clearly demonstrates that Congress did not place the entire burden of underfunding on the withdrawing employers. *Textile Workers*, slip op. at 947. Congress, for instance, required employers to make higher minimum contributions than under ERISA, 29 U.S.C. § 1423 (Supp. V 1981); the PBGC's insurance premiums were increased, *id.* § 1306; funds were made available to supplement plan assets so that insolvent plans could continue to operate with reduced benefit payments and without requiring prohibitively high employer contributions, *id.* § 1431; participant's benefits were made subject to limited reductions in financially troubled plans, *id.* § 1426; and the PBGC's guarantee was reduced, *id.* § 1322(a). *See Peick*, 539 F. Supp. at 1051-52; *Textile Workers*, slip op. at 948. Our view of prospective legislation is, of course, quite different from the "disfavor of retrospective legislation" that lay at the core of *Shelter Framing*. 705 F.2d at 1512. We conclude, on balance, that the equities weigh in favor of the employees.

The final *Nachman* factor is whether the statute included provisions to limit and moderate the effect of the burdens it imposed. 592 F.2d at 962-63. The intervenors assert that the MPPAA has almost no moderating features. In a sense, they are correct. The statute does mitigate the effect of withdrawal liability to some extent by: a) limiting liability only to employers who voluntarily withdraw without a successor, 29 U.S.C. §§ 1384, 1390 & 1398, b) limiting the overall amount of withdrawal liability by a *de minimis* rule to eliminate the burden on small

employers, 29 U.S.C. §§ 1389, 1405, c) permitting periodic installment payments of withdrawal liability, 29 U.S.C. § 1399(c), and d) allowing pension plans to fashion their own withdrawal rules, 29 U.S.C. § 1404. These provisions, however, may provide "little, if any, comfort for the employers." *Shelter Framing*, 705 F.2d at 1514. Accordingly, we find the fourth *Nachman* factor to weigh against the MPPAA's constitutionality. On balance, however, the *Nachman* analysis reveals that the MPPAA is constitutional.

C. THE CONTRACT CLAUSE ISSUE.

The employers claim that the MPPAA retroactively impairs contractual relations in violation of the contract clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). They argue that, like the statute struck down in *Allied*, the MPPAA grossly distorts employers' contractual obligations to their former employees by imposing obligations substantially beyond the terms of negotiated employment contracts.

Reliance on *Allied* is misplaced. In that case, the Supreme Court struck down as violative of the contract clause a Minnesota statute imposing pension fund liability on an employer. However, "a number of critical differences exist between the Minnesota statute and the MPPAA. Most significantly, *Allied* involved a state statute, not an act of Congress. The prohibition against impairing the obligation of contracts is directed against state statutes." *Textile Workers*, slip op. at 958. We find the MPPAA to pass contract clause muster.

D. REMAINING CONSTITUTIONAL CONTENTIONS.

Plaintiffs assert that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds. The argument is that it is improper to allow the PBGC to decide whether to pay unfunded vested benefits of plans that terminate before January 1, 1978. *See* 29 U.S.C. § 1181(c)(1) (repealed 1980). We find this issue moot since, as of July 1, 1980, the PBGC no longer has this discretionary power.

In the final pages of their Memorandum of Points and Authorities, intervenors raise several constitutional challenges to the MPPAA. They assert that the statute (a) involves a taking of property without a hearing, analogizing MPPAA withdrawal liability to a writ of garnishment, (b) fails to allow judicial participation prior to a seizing of property, (c) violates due process by giving the trustees' calculations of withdrawal liability a presumption of correctness, (d) deprives intervenors of a right to a jury trial, and (e) is unconstitutionally vague.

Intervenors were allowed to join in this litigation "on the condition that they do not litigate beyond the scope of plaintiffs' first amended complaint." *Connolly v. PBGC*, CV 75-2037 (C.D. Cal. 1982) (order granting intervention). The first amended complaint focuses on the MPPAA's disruption of existing collective bargaining relationships, and its alleged unconstitutional taking of property without compensation or rational basis. Nowhere in the complaint are there facts alleged which would support the additional procedural due process claims advanced by the intervenors. These contentions are hereby ordered stricken from the record. They are outside the confines of the first amended complaint and beyond the scope of permissive intervention.

CONCLUSION

Summary judgment is granted in favor of the defendant as to all of plaintiffs' and intervenors' facial constitutional challenges. We do not, however, resolve the constitutionality of the statutes as applied to particular parties. That issue, not raised by this lawsuit, is being litigated in another district.

SO ORDERED.

The Clerk of the Court shall serve copies of this Order, by United States Mail, upon the attorneys of record for the parties appearing in this action.

Dated: April 25, 1984

/s/ Dorothy W. Nelson
DOROTHY W. NELSON
United States Circuit Judge
Sitting by Designation

/s/ David W. Williams
DAVID W. WILLIAMS
United States District Judge

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge

No. 81-5361

D.C. No. 75-2037 DWW

United States Court of Appeals
For the Ninth Circuit

John L. Connolly, C.V. Holder,
Howard C. Dennis, John C. Maxwell, James J. Kirst,
C. William Burke, Kenneth J. Bourguignon,
Joseph H. Seymour, Richard L. Corbit,
Harold Edwards,
Donald E. Mier, William C. Waggoner, Richard Gannon
and
Alfred Harrison, each in his respective capacity
as Trustee of the Operating Engineers Pension Trust,
Plaintiffs-Appellants,

v.

Pension Benefit Guaranty Corporation,
a non-profit corporation established within the
Department of Labor
of the United States of America,
Defendant-Appellee.

Appeal from tne United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding
Argued and submitted March 5, 1982
[Filed April 9, 1982]

OPINION

Before: Wright, Alarcon and Reinhardt, Circuit Judges
Alarcon, Circuit Judge:

Members of the Board of Trustees [Trustees] of the Operating Engineer's Pension Trust [Trust], filed a complaint in the district court on June 17, 1975, seeking

declaratory judgment, damages, and injunctive relief against defendant, Pension Benefit Guaranty Corporation [PBGC]. Trustees sought to resolve whether their pension plan was a "defined contribution plan" intended by the Employment Retirement Income Security Act [ERISA] to be outside the purview of PBGC or a "defined benefit plan" governed by PBGC 29 U.S.C. §§ 1002(34)-(35), 1321(b)(1). If the pension plan was determined to be a defined benefit plan, Trustees alleged certain retroactive liabilities and pension plan termination insurance provisions of ERISA were in violation of the due process and taking clauses of the fifth amendment and acted as an impairment of contract.

The district court held the pension plan to be a defined contribution plan and enjoined PBGC from acting in any manner inconsistent with that interpretation. *Connolly v. PBGC,* 419 F. Supp. 737, 741-42 (C.D.Cal. 1976). PBGC was also required to return the $12,043.00 termination insurance premium paid by Trustees. *Id.* at 742.

This court reversed the district court, holding Trustees' pension plan to be a defined benefit plan, and remanded the case for consideration of the constitutional questions posed by Trustees. *Connolly v. PBGC,* 581 F.2d 729, 734-35 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979).

Trustees made application in the district court for an order convening a three-judge court. On September 13, 1979, the district court refused to issue the order on the basis that Trustees raised no substantial constitutional questions. Trustees' motion to reconsider the ruling was denied.

On November 2, 1979, Trustees filed a petition for writ of mandamus in this court to compel the convening of a three-judge court. We summarily denied that petition. *Connolly v. Williams,* No. 79-7580 (9th Cir. Jan. 14, 1980). Trustees' motion in the Supreme Court for leave

to file a petition for writ of mandamus was similarly denied. *Connolly v. United States District Court,* 445 U.S. 959 (1980).

After holding PBGC's motion for summary judgment under submission during the mandamus proceedings, the district court granted summary judgment in favor of PBGC on March 26, 1981 on the ground that Trustees' claims presented no substantial constitutional questions. Trustees appealed to this court. We reverse.

The issues before this court are: (1) did the summary denial by this court of a petition for writ of mandamus to compel the convening of a three-judge court foreclose further appellate review of the merits of the claim; (2) did the constitutional challenge to the required payment of pension plan termination insurance premiums raised by Trustees, become moot; and (3) did the district court err in ruling that Trustees' claim raises no substantial constitutional questions.

I. FACTS

The Operating Engineers Pension Trust is a joint labor-management trust created in 1960. The trust agreement created the pension plan [Plan] administered by Trustees. The purpose of the Trust is to create a pension fund to which a number of employers make contributions, and from which their employees may draw benefits when they reach a stated age of retirement. The plan is a defined benefit plan subject to regulation by ERISA. *Connolly,* 581 F.2d at 734-35.

The employers periodically enter into collective bargaining agreements to establish the amount of their contribution to the Plan. The amount contributed by each employer is determined by multiplying their employees' hours of service by a rate specified in the current agreement. According to Trustees, hourly rates have ranged

from $.05 per hour in 1960 to $1.50 per hour at the time the complaint was filed in 1975. The trust agreement clearly states that the employers' obligation for pension benefits is ended when the amount agreed to in collective bargaining is paid, even if the contributions are insufficient to pay the benefits under the Plan.

ERISA established PBGC and provided that PBGC would guarantee the payment of certain pension benefits to participants of defined benefit plans such as the Plan here. 29 U.S.C. §§ 1302, 1322. An employer subject to ERISA could in certain instances be liable to PBGC for the guaranteed benefits up to an amount not exceeding 30 percent of the net worth of that employer. 29 U.S.C. § 1362 (amended 1980). Collection of annual insurance premiums was also authorized. 29 U.S.C. § 1306 (amended 1980). ERISA thereby imposed new and in some cases retroactive liabilities upon employers contributing to such plans. *Connolly,* 581 F.2d at 732.

II. SUMMARY DENIAL OF A WRIT OF MANDAMUS

PBGC maintains that this court should not review Trustees' previously unsuccessful efforts to convene a three-judge court. PBGC premises this argument on the assumption that this court's denial of an interlocutory petition for writ of mandamus, without opinion, establishes the law of the case and therefore further review of the matters raised in the petition for a writ by way of an appeal from a final judgment is foreclosed. In the Ninth Circuit "[w]hen a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court. *Firth v. United States,* 554 F.2d 990, 993 (9th Cir. 1977); *see also, Corex Corp. v. United States,* 638 F.2d 119, 122 (9th Cir. 1981). In the case *sub judice,* the appellate

court's order stated simply that "[u]pon due consideration, the petition for writ of mandamus is denied." (Excerpt of Record at 290). We disagree with PBGC that this perfunctory disposition expressly or impliedly reached the merits of the petition for mandamus and established the law of the case. PBGC's argument misperceives the extraordinary nature of the writ of mandamus. Ordinarily legal issues are resolved through appellate review after judgment has become final in the trial court.

Our research has failed to disclose any opinion of a federal court that precisely addresses PBGC's contention that summary denial of a writ of mandamus disposes of the merits of the petition. We suspect that this dearth of authority is due to the fact that no other litigant has previously made so bold a claim. The California Supreme Court, however, has spoken on this issue. We are persuaded by the well reasoned opinion in *People v. Medina,* 6 Cal. 3d 484, 492 P.2d 686, 99 Cal. Rptr. 630 (1972). In *Medina,* defendant's pretrial application for an extraordinary writ to review the denial of his motion to suppress evidence was summarily denied. *See id.* at 487, 492 P.2d at 687, 99 Cal. Rptr. at 631. The government argued that this ruling established the law of the case precluding further review of the issue on appeal from a judgment of conviction. *Id.* at 490-91, 492 P.2d at 690, 99 Cal. Rptr. at 634. The California Supreme Court rejected this contention. The court held instead that a denial without opinion of a pretrial petition for a writ does not constitute a determination on the merits. *Id.* at 493, 492 P.2d at 691, 99 Cal. Rptr. at 635. The court recognized that any one of a number of reasons might impel appellate justices to deny a petition for a pretrial writ without opinion. "(G)iving such a minute order conclusive effect on an appeal from a subsequent judgment of conviction would amount to improper conjecture

and surmise as to the theoretically possible mental processes of the justices." *Id.*

In *Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977), this court identified five specific guidelines which should be considered in determining whether to issue a writ of mandamus. These guidelines are:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. . . . (3) The district court's order is clearly erroneous as a matter of law. . . . (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . . (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. at 654-55 (citations omitted).

The panel of this court that reviewed the petition for mandamus in this matter gave no clue as to the reasons for its action. Any of the criteria set forth in *Bauman* might have motivated the court to deny Trustee's petition. We decline to speculate. We hold instead that a summary denial of a petition for a writ of mandate does not establish the law of the case.

III. MOOTNESS

PBGC argues that Trustees' constitutional challenges to ERISA have become moot. A case is moot if it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). *See also, Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1378 (9th Cir. 1978) (where activities sought to be enjoined had already occurred, the action was moot). In the case at bar, no events

have occurred which foreclosure controversy regarding Trustees' attacks on ERISA. Trustees challenge the constitutionality of retroactive liability provisions provided for by ERISA as well as the constitutionality of the requirement that Trustees pay pension plan termination insurance premiums. PBGC conceded in their written briefs that Trustees' due process challenge to the requirement to pay premiums is not moot. Their brief states: "[Trustees have] been assessed for termination insurance premiums under provisions of 29 U.S.C. §§ 1306 and 1307. Accordingly, a due process challenge to the requirement to pay premiums is not moot." PBGC's Brief at 11-12 (footnote omitted). At oral argument, PBGC reiterated that although ERISA had been substantially amended in 1980, the requirement that insurance premiums must be paid was not altered. Trustees' challenge to this provision of ERISA generates a present live controversy." We need not reach the question whether the 1980 amendments render Trustees' challenge to the retroactive liability provisions of ERISA moot.

IV. SUBSTANTIAL CONSTITUTIONAL QUESTIONS

PBGC and Trustees agree that substantial questions of constitutionality require the convening of a three-judge court. 28 U.S.C. §§ 2282, 2284.[1] The dispute we must

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[1]Act of June 25, 1948, ch. 646, 62 Stat. 968 (repealed 1976) (28 U.S.C. § 2282) provides that "(a)n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 [delineating, *inter alia*, procedures for convening a three-judge court] of this title." It was repealed in 1976; however, the repeal was made inapplicable to actions commenced on or before Aug. 12, 1976. Act of Aug. 12, 1976, Pub. L. No., 94-381, §§ 7,

resolve is whether Trustees' challenges are constitutionally insubstantial. "A claim is insubstantial [for the purposes of convening a three judge court] only if ' "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' " *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (quoting *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933))); *see also, Lopez v. Butz*, 535 F.2d 1170, 1171 (9th Cir. 1976). That claims are of doubtful merit does not render them insubstantial for the purposes of convening a three-judge court. *Goosby*, 409 U.S. at 518. PBGC contends that the constitutional claims raised by Trustees challenging the requirement to pay insurance premiums have been rendered insubstantial by five prior determinations of the Supreme Court.

We disagree. None of the cases relied upon by PBGC involves a constitutional challenge to ERISA. *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980) resolved only the question of whether ERISA had been "properly construed to impose continuing liability on an employer that had lawfully terminated its plan prior to the effective date of the minimum vesting standards contained in Title I of ERISA." *Id.* at 368. The court expressly refused to reach any constitutional challenges. *Id.* In *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), the constitutional issues addressed by the court pertained to the Agricultural Marketing Agreement Act of 1937 which regulated the handling of milk in the New York metropolitan area. *Id.* at 539-40. *Helvering v. Davis*, 301 U.S. 619 (1937) and *Steward Machine Co. v. Davis*, 301 U.S. 548

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90 Stat. 1119 (1976), and does not therefore apply to the instant case which was originally filed on June 17, 1975.

(1937), decided the same day, dealt with the constitutionality of portions of the Social Security Act of August 14, 1935. *Helvering*, 301 U.S. at 638-39; *Steward*, 301 U.S. at 573, 578. Finally, the statute under constitutional attack in *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), was a state statute. *Id.* at 109. None of these cases forecloses the subject of the constitutionality of mandatory pension plan termination insurance premium payments by employers, or the constitutionality of retroactively imposed liability for inadequately funded or terminated private pension plans. Trustees have satisfied the *Goosby* standard of constitutional substantiality for the purpose of convening a three-judge court.

REVERSED and REMANDED with directions to the district court to convene a three-judge court.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 14, 1980

Wayne Jett, Esquire
3055 Wilshire Blvd., Suite 420
Los Angeles, California 90010

RE: John L. Connolly, et al. v. United States District Court for the Central District of California (Pension Benefit Guaranty Corporation, real party in interest)
No. 79-1246

Dear Sir:

The Court today entered the following order in the above-entitled case:

"The motion for leave to file a petition for a writ of mandamus is denied."

Very truly yours,
MICHEL RODAK, JR., Clerk
By Francis J. Lorson
Deputy Clerk

cc: Thomas E. Stanton, Jr., Esq.
Henry Rose, Esquire

United States Court of Appeals
for the Ninth Circuit

No. 79-7580

D.C. CV75-2037 DWW
CENTRAL CALIFORNIA

JOHN L. CONNOLLY, C. V. HOLDER,
HOWARD C. DENNIS, JOHN C. MAXWELL,
JAMES J. KIRST, et al.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

PENSION BENEFIT GUARANTY CORPORATION, a
non-profit corporation, etc.,

Real Parties.

ORDER

Before: GOODWIN and FARRIS, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

Mo Cal 1/7/80

United States District Court
Central District of California

No. CV 75-2037DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

[Filed Sept. 13, 1979]

ORDER RE
THREE-JUDGE COURT

Plaintiffs, trustees of the Operating Engineers Pension Trust, move for convocation of a three-judge court to hear its constitutional claim that regulations of the Pension Benefit Guaranty Corporation infringe upon their right to contact and deprive them of property without due process. The case, filed in 1975, predates Public Law 94-381, 90 Stat. 1119, which amended the provisions for a prejudge court. However, Section 7 of that enactment specifically makes that Act not applicable to actions commenced before the enactment. The case is before this court on remand from the Court of Appeals, which has reversed this court's ruling based upon its construction of the statute. This court had agreed with the Trustees that their pension plan was excluded from the scope of the regulations complained of which plaintiffs complain.

Trustees assert that because they must make certain additional payments under ERISA beyond their contractual provision, that their right to contract has been infringed, and that there is a due process violation. This court considers the question, and has determined that as a matter of law there is no substantial constitutional

question raised warranting the convening of a three-judge court. The Court of Appeals made clear in its order of reversal and remand that the pension plan at issue fell under the provisions of ERISA. As a qualified pension plan under ERISA, the plan is a beneficiary of the tax benefits provided by the law, as well as being required to conform to the complained-of regulations issued by the agency entrusted with administration of provisions of ERISA. The Supreme Court has made clear that in claims of infringement of the constitutional right to contract and of a deprivation of property without due process, a party must accept the responsibilities imposed by a governmental scheme as part of its distribution of benefits, absent other due process violations. *Fahey v. Mallonee*, 332 U.S. 245 (1947). There is no allegation that the regulations about which plaintiffs complain were adopted in a manner contrary to due process or other rule-making requirements.

This Court may decline to certify the need to convene a three-judge court when the constitutional question presented is insubstantial. I therefore decline to do so.

IT IS SO ORDERED.

DATED: This 13th day of September, 1979.

DAVID W. WILLIAMS,
United States District Court

United States Court of Appeals
for the Ninth Circuit

No. 76-2777

JOHN L. CONNOLLY, et al.,
etc.
Appellees,

vs.

PENSION BENEFIT GUARANTY
CORPORATION, etc.
Appellant.

On Appeal from the United States District Court for
the Central District of California

[Filed May 4, 1978]

OPINION

Before ELY and MERRILL, Circuit Judges, and HARPER, Senior District Judge.*

HARPER, Senior District Judge.

This is an appeal by the Pension Benefit Guaranty Corporation (hereinafter referred to as PBGC) from a summary judgment entered in favor of the Board of Trustees of the Operating Engineers Pension Trust (Trustees) which exempted the Operating Engineers Pension Plan (Plan) from coverage under the insurance provisions of Title IV of the Employee Retirement Income Security Act of 1974, 29 USC 1001 et seq. (ERISA or Act).

Federal jurisdiction over this action exists pursuant to 29 USC 1303(f).

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*The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

On December 1, 1974, the Trustees paid a termination insurance premium of $12,043.00 to the PBGC. On April 10, 1975, the Trustees applied to the PBGC for a determination that the Plan was a defined contribution plan exempt from coverage under the insurance provisions contained in Title IV of the Act, 29 USC 1301 et seq. The PBGC informed the Trustees that the Plan was a defined benefit plan subject to the plan termination insurance coverage. Thereafter, the Trustees made a demand for return of their termination insurance premium, which was refused by PBGC.

On June 17, 1975, the Trustees filed a complaint in the district court for a declaratory judgment, damages and injunctive relief against the PBGC, challenging its determination that the Plan was a defined benefit plan subject to insurance coverage. Upon cross motions for summary judgment, the district court granted summary judgment in favor of the Trustees. *Connolly* v. *Pension Benefit Guaranty Corp.*, 419 F. Supp. 737 (C.D. Calif. 1976). In its order the district court declared the Plan to be a defined contribution plan exempt from insurance coverage under the Act, enjoined the PBGC from acting inconsistently therewith, and required the PBGC to return the Trustees' premium payment. *Connolly* v. *PBGC, supra* at 741-42. This appeal followed.

Initially it should be noted that the determination of the PBGC herein is entitled to great deference in the construction and application of ERISA. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In *General Electric* v. *Gilbert*, 429 U.S. 125, 141-42 (1976), quoting from *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1940), the Supreme Court stated:

> " 'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of

their authority do consitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

The Operating Engineers Pension Trust is a joint labor-management trust established in conformance with § 302(c)(5) of the Labor Management Relations Act of 1947, as amended in 1959, 29 USC 186(c)(5). This trust was created in 1960 by agreement between eleven home builders associations and the International Union of Operating Engineers. The trust agreement created the multiemployer pension plan at issue here. The Plan is a tax qualified employee pension plan within the meaning of § 4021(a)(2) of ERISA, 29 USC 1321(a)(2). It is administered by a fourteen-member Board of Trustees appointed in equal part by the employers and the union. The individual plaintiffs are the trustees of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which their employees may draw benefits when they reach a stated age of retirement.

Under the pension trust, the employers periodically enter into collective bargaining agreements to establish the amount of their conribution to the Plan. In fulfillment of their obligation under those agreements, the employers contribute a certain amount of money to the Plan each month. The amount contributed by each employer is determined by multiplying their employees' hours of service by a rate specified in the current agreement.

The monthly amount of the pension payable to an eligible participant is determined by multiplying the Pension Factor in the Plan by the employee's Pension Credits and Prior Service Credits. The Pension Factor is an actuarial tool, calculated to translate plan experience into retirement benefits. In setting the Pension Factor, the Trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and any variance between actual and anticipated employer contributions and delinquencies. The Pension Factor is periodically revised by the Trustees.

The Pension Credit is a service-related formula determined in part by the amount of time spent on the job by the participant. The Plan also provides for some participants to be entitled to Prior Service Credits, for time spent on the job prior to the execution of this trust and Plan. Pension Credits are earned even if the employer fails to contibute the full amount of his obligation. The employee receives the appropriate pension benefit, as calculated by the above described formula, even though sufficient contributions have not been made on his behalf by his employer to the Plan.

By the express terms of the Plan, the employer's sole obligation to the pension fund is to pay such contributions as required by the collective bargaining agreements. The trust agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the fund. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.

ERISA is the product of several years of legislative effort to improve the American pension system. ERISA is a complex piece of legislation which addresses itself to many problems. One of the foremost concerns of Congress

in enacting the Act was to assure workers that retirement benefits would be available when needed. 29 USC 1001(a), (c) provides:

> "The Congress finds that . . . owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to requisite funds to pay promised benefits may be endangered; that owing to the termination of plans before adequate funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . .
>
> "It is hereby further declared to be the policy of this Chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to . . . meet minimum standards of funding, and by requiring plan termination insurance."

Consistent with ERISA's remedial function, Congress sought to effectuate the purpose of the Act as far as possible. In a report accompanying an earlier version of the bill, the Senate Committee on Labor and Public Welfare stated:

> "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."

S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973).

The issue before the Court is whether the Plan is a defined benefit plan under 29 USC 1002(35) or an individual account or defined contribution plan under 29 USC 1002(34). If the Plan is a defined benefit plan, it is covered by the termination insurance provisions of the

Act. If it is an individual account or defined contribution plan it is not covered by the termination insurance provisions, 29 USC 1321(b)(1), unless the Plan is a "plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit." 29 USC 1321(c)(1). By definition, any plan that is not an individual account or defined contribution plan, must necessarily be a defined benefit plan. 29 USC 1002(35).

The district court ruled that the Plan is a defined contribution plan, not subject to termination insurance coverage under ERISA. This determination is erroneous.

In its decision the district court looked at the obligation which the employers participating in the Plan have contractually agreed to assume. Because the employers have agreed only to make specified contributions, and have disclaimed any obligation to pay any pension benefit, the district court held that the plan was a defined contribution plan under which no fixed benefit is promised. The district court reached its conclusion by considering that to subject the Plan to ERISA's termination insurance provisions would force upon the employer a greater obligation and liability than he had originally agreed to in his contract. *Connolly* v. *PBGC,* 419 F. Supp at 740.

However, this is precisely what the termination insurance provisions of the Act were intended to do. Whenever the PBGC pays pension benefits to participants of defined benefit plans which have terminated with insufficient assets to pay the benefits promised, (29 USC 1322), the PBGC is entitled to recover the amount of such benefits from the employers who maintained the terminated pension plan, up to an amount not exceeding thirty percent of the net worth of each employer involved. 29 USC 1362-1368. The precise intent of these sections was to impose

substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan.

29 USC 21321(b) provides that termination insurance coverage does not extend to any plan,

> "(1) which is an individual account plan, as defined in paragraph (34) of section 1002 of this title . . ."

29 USC 1002(34) provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The statutory definition of an individual account or defined contribution plan contains two requirements. The first requirement is that a plan must provide for an individual account for each participant. The second requirement is that a participant's benefit must be based solely on the amount in his account. Neither of these requirements is satisfied by the Plan. The Plan does not provide for an individual account for each participant. Contributions on behalf of participants are pooled in a general fund. While a record of contributions received on behalf of a participant is maintained by the Trustees, the participant has no right, title, or interest in these amounts. Under the structure of the Plan, no purpose is served in providing an individual account for each participant. The amount of a participant's benefit at retirement is not based on the amount of contributions paid on his behalf into an account. Rather the benefit is determined by a service related formula, Pension Credits plus Prior Service Credits multiplied by the Pension Factor. The

participant is entitled to receive that amount even though a sufficient amount of contributions has not been made on the participant's behalf.

The legislative history of ERISA clearly demonstrates that the primary purpose for termination insurance is to insure the payment of benefits in the event a plan terminates before it is fully funded. Legislative History of the Employee Retirement Income Security Act of 1974, at 213, 1830-31, 1865-72, 2361, 3371, 3373, 4802 (1976) (hereinafter cited as *Legis. Hist.*)

> "The termination insurance program is intended to work hand-in-hand with the minimum funding standards imposed by the bill, since the latter will limit the losses due to plan termination by requiring more adequate funding of pension plans."

Legis. Hist. at 1094.

In the case of a true individual account plan, there is no possibility that the plan would terminate while being underfunded. Under such a plan, a separate account is kept for each covered employee, and the employee's accrued benefit at all times is simply "the balance of the individual's account." 29 USC 1002(23)(b). Thus by definition, an individual account plan can never be underfunded. Consequently, the funding provisions of ERISA, subject to certain exceptions, do not apply to such a plan. 29 USC 1081(a)(8). Individual account plans are excluded from ERISA's funding rules because these plans do not specify any benefit beyond the balance of each individual's account at the time it is disbursed.

For a similar reason, an individual account plan is also excluded from termination insurance coverage. 29 USC 1321(b)(1). Congress concluded that in the case of a true individual account plan there was no need for termination insurance, just as there was no need for rules as to

the funding of such an account. Since the participant is merely entitled to benefits determined by his own account, there is no unfunded amount to insure. *Legis. Hist.* at 1149.

Defined benefit plans, on the other hand, are subject to being underfunded for a variety of reasons because the benefits are not defined as the eventual balance in the individual's account. A defined benefit plan may provide benefits for service prior to the inception of the plan. In such a case, these prior service benefits need not be funded immediately, but may be amortized over thirty or forty years. 29 USC 1082(b)(B). As stated earlier, the Plan at issue provides for benefits for service prior to the inception of the plan, and the Plan is presently underfunded because *inter alia* of these promised benefits.

A funding deficiency in the Plan may also occur when the Trustees, through the use of the Pension Factor, establish pension benefits in excess of the amount of contributions received during the term of the collective bargaining agreement. Under the type of plan involved herein, if actuarial assumptions and calculations used in establishing the Pension Factor are correct as of the beginning of the term of the collective bargaining agreement, and the agreed upon employer contributions are adequate and paid when required, there would be no funding deficiency by reason of miscalculation during the term of the collective bargaining agreement. However, when anticipated contributions, relied upon in establishing benefits, exceed actual contributions unfunded liability may occur.

The risk of termination of a multiemployer Taft-Hartley pension plan, such as the plan before the Court, is significantly less than in a single employer plan, because of its larger economic base. Indeed, an effort was made to

exempt multiemployer plans from funding and/or termination insurance because of their relatively remote likelihood of termination. However, these proposals for outright exemption of multiemployer plans were rejected. Collectively bargained mulitemployer plans were not exempted from the requirement that unfunded past service liability be amortized. Rather, such plans were granted an additional ten years beyond the standard thirty-year period within which to amortize the unfunded past service liability. 29 USC 1982(b)(2)(B).

> "This recognizes that multiemployer plans generally have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties."

Legis. Hist. at 3317.

Recognition of the financial strength of a multiemployer plan is also contained in ERISA's insurance program. With respect to termination insurance, the statutory multiemployer plan premiums were established at one-half the rate for single employer plans. 29 USC 1306(a)(3)(B). The multiemployer plan's lower risk of termination was apparently sufficient to justify a different premium rate; however, it was not sufficient to warrant total exemption from termination insurance coverage.

> "In view of the relatively minor incidence of multiemployer plan terminations the conferees determined to delay mandatory coverage of multiemployer plan terminations until January 1, 1978, but to commence premium payments by such plan as of date of enactment to build up reserves in the event the Pension Benefit Guaranty Corporation extends discretionary coverage prior to that date. It is to be expected that this discretionary coverage will be

> extended fully to protect employees benefits in multiemployer plans.
>
> "The conferees had no intention whatsoever of treating workers in these plans as 'second-class citizens' and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved."

Legis. Hist. at 4767.

The district court also held that 29 USC 1321(c)(1) was applicable to the Plan. 29 USC 1321(c)(1) provides:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

The district court reasoned that the independent fiduciary duties of the Trustees necessarily precluded any characterization of the Trustees as employer representatives participating in the determination of pension benefits. *Connolly v. PBGC,* supra at 741.

In light of this Court's determination that the plan is not an individual account plan, and thus not exempt from termination insurance under 29 USC 1321(b)(1), we do not reach the issue of whether 29 USC 1321(c)(1) is applicable to the case at bar.

The district court's decision to proceed with the statutory construction issue without convening a three-judge court was permissible. See *Hagans v. Lavine,* 415 U. S. 528, 543-44 (1974).

The constitutional issues sought to be raised by the plaintiffs were not reached in the district court, and thus not properly before this Court. At this time, the Court makes no ruling with respect to any constitutional issues

which the parties may wish to present on remand. Generally, a reviewing Court should remand a case to the district court for consideration of a question not previously considered there. *Boire v. Miami Herald Publishing Co.,* 343 F. 2d 17, 25, (5th Cir.) *cert. denied* 382 U. S. 824 (1965). This Court holds only that: the Plan involved herein is not an individual account plan as defined by 29 USC 1002(34) and thus not exempt from the termination insurance program under 29 USC 1321(b)(1); and that the employer's disclaimer of liability for the payment of benefits does not convert the Plan into an individual account plan.

Accordingly, this case is Reversed and Remanded.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
No. CV 75-2037-DWW

John L. Connolly, C. V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H. Seymour, Richard L. Corbit, Harold Edwards, Donald E. Mier, William C. Waggoner, Richard Gannon and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Plaintiffs,

vs.

Pension Benefit Guaranty Corporation, a non-profit corporation established within the Department of Labor of the United States of America,
Defendant.

[Filed Feb. 12, 1976]

ORDER GRANTING SUMMARY JUDGMENT

The Operating Engineers Pension Trust is a joint labor-management trust created in conformance with § 320(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 (29 USC § 186(c)(5). It was created in 1960 by a written agreement to which several contractors associations and home builders associations were signatories as employers and the International Union of Operating Engineers, Local Union No. 12, as the organization representing the employees. The individual plaintiffs are trustees of the trust who have the power to

administer the Pension Fund and to administer and maintain the Pension Plan which is the subject of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which employees may draw benefits when they reach a stated age of retirement.

Congress has concerned itself over the years with the problem of employee pension funds which have terminated with financial shortages resulting in an inability of many employees to receive expected benefits upon retirement. A recent Congressional effort to bring about a cure for this problem has resulted in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, this act seeks to protect the well-being and security of the millions of employees and their dependents who are affected by benefit plans. It seeks to set safeguards for the operation of plans and to establish standards for the administration of pensions in order to minimize terminations of plans and losses to beneficiaries. Section 4002 of the Act establishes within the Department of Labor a corporate body to be known as the Pension Benefit Guaranty Corporation and its purpose is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants. Section 4005 of the Act establishes four revolving funds which are intended to serve as insurance against the failure of the particular types of pension funds which this part of ERISA is designed to cover. The corporation is empowered to prescribe insurance premium rates which it assesses against certain employers to guarantee that the pension funds created by those employers will not suffer short-fall. In the event of a termination of a pension plan of this type, the employer could be held liable for shortages in the fund up to 20% of the net worth of the employer's business, 29 USC 1362(a) and (b). Not all

types of pension plans are intended to be covered under the insurance provisions of ERISA. Section 4021(b) of the Act provides as follows:

> "(b) This section does not apply to any plan (1) which is an individual account plan, as defined in paragraph (34) of Section 1002 of this title."

Paragraph (34) of Section 3 of the Act provides as follows:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1), of the Act provides as follows:

> "For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Plaintiff trustees administer a pension fund for the benefit of employees within the building industry. Defendant Pension Benefit Guaranty Corporation has taken the position that the type of pension administered by plaintiff trustees is covered by the insurance provisions of ERISA and the corporation compelled plaintiff trustees to pay a premium of $12,043 into its guaranty fund. The plaintiffs contend that their pension fund comes within the exceptions set forth in paragraph (34) of Section 3 of the Act and that they are not covered by the insurance provisions. If plaintiffs' fund is not included within the exceptions

just noted, the trustees would also be limited by provisions of ERISA as to the manner in which they could administer the fund over which they are trustees. Additionally, employers who contribute to plaintiffs' fund would be subject to the liability provisions of ERISA in the event of a termination of the plan.

In short, plaintiff contends that its plan is an "individual account plan" or "defined contribution plan" as referred to in 29 USC § 1002(34) while the defendant corporation contends that plaintiffs' plan is a "defined benefit plan" as defined in Section 1002(35) and is therefore covered. Plaintiffs' trustees communicated their objections to the defendant corporation upon being required to pay premiums into the corporation's Guaranty Fund, but defendants legal staff concluded that the Operating Engineers Pension Trust is a Defined Benefit Plan for the purposes of Section 4021(b)(1) because plaintiffs' method of computing a participant's pension benefit appeared to be a formula based on service and therefore within the class of plans called defined benefit plans rather than an individual account plan. In this litigation, which seeks to have this Court determine whether plaintiffs' plan comes within the exceptions of Section 4021(b), the defendant urges that since it is the agency charged with enforcing ERISA, its determination of coverage should be given more weight than that reached by plaintiff trustees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

AGREEMENT ESTABLISHING THE OPERATING ENGINEER'S PENSION TRUST

The 1960 agreement which established the trust administered by plaintiffs (hereinafter called the "Trust Agreement") provided that each collective bargaining agreement between the union and the employers would bind the employers to abide by the Trust Agreement and

to pay a stated amount into the trust with respect to each hour worked by each employee covered by the collective bargaining agreement. Article II, Section 7 of the Trust Agreement provides as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Fund, except to the extent that he or it may be an Individual Employer required to make contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

Article VII, Section 4 of the Plan provides as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the

benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

Article VIII, Section 2 of the Plan provides:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the

Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

FORMULA FOR FIXING PENSION AMOUNT

The monthly amount of the pension payable to a participant who is eligible for a pension in plaintiffs' plan is determined by multiplying the numbers of his respective Prior Service Credits and Pension Credits accumulated by the appropriate Pension Factor. The Plan provides for some participants to be entitled to Prior Service Credits. It also provides for certain participants to receive Pension Credits pursuant to a prescribed formula. The Pension Factor used to determine the benefit entitlement of participants is fixed from time to time. In setting the Pension Factor, the trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies.

EMPLOYER CONTRIBUTIONS

Under the Pension Trust created by its signatories in 1960 the various employers would enter into collective bargaining agreements from time to time with the union. As a part of the terms of that agreement the employer obligated himself to make certain contributions into the trust fund for each of his employees, measured by the number of hours worked and any Prior Service Credits or Pension Credits to which the employee would be entitled. The amount the employer is obligated to contribute to the fund may change from time to time. This comes about because the trustees of the Plan are authorized annually

to have prepared an actuarial status of the fund and this is taken into account in determining which amendments or modifications shall be made to the Pension Plan. If it appears from the actuarial report that the fund is in peril, the trustees have the power at a given period to compel such additional contributions into the fund from the employers as should preserve the integrity of the fund.

By its terms as quoted hereinbefore, the Plan assures the employer that his sole obligation to the fund is to pay such contributions for each employee as from time to time the plaintiff trustees shall determine is appropriate. The agreement states in clear and concise language not subject to any ambiguity that the employers obligation to the employee for pension benefits is ended when he pays the appropriate contribution into the fund. In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather, it is clear that he only promises that he will pay into the fund each pay period the contribution that is prescribed by the trustee and that his obligation to the fund is then ended.

In negotiating a collective bargaining agreement there is the possibility that a union could make a demand upon an employer to extend to the employee a defined pension benefit, but such has not been done in the contract under review. In the negotiations that attended this agreement the employer demanded that his obligation be ended once he made a contribution to the individual account of the employee and the union accepted the provision. To interpret this carefully constructed agreement as not coming within the exceptions of Section 1002(34) is to force upon the employer a greater obligation and liability than he had agreed to in his contract.

Defendant argues strenuously that plaintiffs' plan is covered by the insurance provisions of ERISA because it is not a true "individual account plan" as defined by

Section 1002(34). That section defines an individual account plan as a plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. Defendant states that because the contributions of the employer to the individual's account is not maintained precisely like the concept of one's savings account in a bank, but instead the money is pooled by the trustees for investment purposes, and because of the computerized method employed by the trustees in reckoning the accumulated amounts contributed to the individual's account from time to time, this destroys proper characterization of the plan as an "individual account plan" or "defined contribution plan." The legislation which must guide the consideration of this dispute is lengthy and complex and represents draftsmanship that is confusing, to say the least, but a fair reading of the Act and the legislative history which preceded the enactment leads me to conclude that the structure of plaintiffs' plan properly comes within the exceptions of Section 1002 and should be characterized as an individual account plan.

Defendant claims that plaintiffs' plan does not come within Section 1002(34) because an "individual account plan" is one which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to each participant's account. Defendant argues that in the instant plan, benefits are not based solely upon the amount contributed to each participant's account because a part of the retirement benefit is based on past service. The parties stipulate that a participant is entitled to a

pension benefit which is determined by multiplying his "Prior Service Credits" by the current "Pension Factor." An employee earns one Prior Service Credit (up to 20) for each year of covered service in the industry prior to the establishment of the plan by the 1960 agreement.

Moreover, defendant argues, the plan provides for a monthly benefit determined by multiplying each "Pension Credit" by the appropriate "Pension Factor." A "Pension Credit" is earned whenever a participant works a given number of hours. The retirement benefits payable to a participant are based directly upon the number of hours worked by the employee and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits.

Moreover, PBGC argues that there is another reason for concluding plaintiffs' plan to be a covered plan. Section 4021(c)(1) of the Act, 29 USC § 1321(c)(1) provides as follows:

> "For purposes of subsection (b)(1) of this section, the term "individual account plan" does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Defendant argues that employer representatives participated in the determination of the benefit in plaintiffs' plan.

As I see it, the employer is signatory to an agreement which sets up a joint labor-management trust which has a Board of Trustees. The Trust binds the employer to pay a stated amount to the Trust for each employee covered by the collective bargaining agreement. The trustees are the ones who make a determination of the benefits, and this scheme includes no such participation on the part of the

employer as is intended in Section 4021(c)(1) of the Act.

I conclude that plaintiffs' plan is a defined contribution plan under which no fixed benefit is promised; that it comes within the exception stated in 29 USC § 1321(b)(1) and that plaintiffs are entitled to summary judgment. The Court further finds that defendant should be required to return to plaintiff the sum of $12,043 plus interest thereon from the date said sum was paid to defendant and that defendant, its agents, employees and representatives are enjoined from acting in any manner inconsistent with the judgment of this Court as set forth in this memorandum which, pursuant to Rule 52(a) FRCP shall take the place of findings of fact and conclusions of law.

DATED: This 12th day of February, 1976.

DAVID W. WILLIAMS,
United States District Judge

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Nos. 84-1555 & 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the decision below, sustaining the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. § 1381 *et seq.*) against attack under the Takings Clause of the Fifth Amendment to the Constitution, should be summarily affirmed by this Court.

2. Whether the decision below, sustaining the multiemployer pension insurance program, including the imposition of premiums (29 U.S.C. §§ 1306, 1307), against constitutional attack, should be summarily affirmed by this Court.

PARTIES

The names of all of the parties to the proceedings below are listed in the Jurisdictional Statement ("J.S.") in No. 84-1555, at 1 n.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-1555 & 84-1567

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

WOODWARD SAND CO., INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

On Appeal from the United States District Court for the Central District of California

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MOTION TO AFFIRM

Appellee Pension Benefit Guaranty Corporation ("PBGC") moves the Court for an order summarily affirming the unreported three-judge court decision of the United States District Court for the Central District of California, on the grounds that the decision below, although on questions not yet directly decided by this Court,[1] is so clearly correct that it does not require further argument.

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[1] Last term, this Court upheld the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980

STATEMENT

This case presents yet another challenge to the constitutionality of the Multiemployer Act's withdrawal liability provisions upheld in *R.A. Gray, supra.*[2] The Court in *R.A. Gray* underscored "the strong deference accorded legislation in the field of national economic policy," 104 S. Ct. at 2718, and stated that Congress was "eminently rational" in effectuating the legitimate legislative purpose of multiemployer pension plan stability with retroactive

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("Multiemployer Act"), P.L. No. 96-364, 94 Stat. 1208 *et seq.*, against a claim that their retroactive application violated the Due Process Clause of the Fifth Amendment. PBGC v. R.A. Gray & Co., —— U.S. ——, 104 S. Ct. 2709 (1984) ("*R.A. Gray*"). In *R.A. Gray*, the Court "assume[d] that the prospective effects of the Act [which are challenged in the instant appeals] satisfy constitutional standards." *Id.* at 2717 n.7.

[2] This Court's jurisdiction is based on 28 U.S.C. § 1253 and former 28 U.S.C. § 2282 (repealed by P.L. No. 94-381, 90 Stat. 1119, but applicable to "any action commenced on or before [August 12, 1976]," 28 U.S.C. § 2282 note). The original complaint in this case, filed on June 17, 1975, sought, *inter alia*, an injunction on constitutional grounds against the enforcement of the pension insurance premium provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 851, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Thereafter, in 1980, Congress enacted the Multiemployer Act.

The district court found the premium issues insubstantial and granted summary judgment on those issues to the PBGC without convening a three-judge district court. Plaintiffs appealed, and the Ninth Circuit reversed, ordering a three-judge court to be convened. The plaintiffs then moved to amend their complaint to raise questions as to the constitutionality of the Multiemployer Act, and the amendment was allowed by the district court. The district court also allowed intervention by several employers. Under Rules 15 and 24 of the Federal Rules of Civil Procedure, the district court has authority to allow the amendment and the intervention. Consequently, the questions presented do arise in an "action commenced on or before" August 12, 1976, and, in deciding this motion, the Court need not reach the appropriateness of the orders convening a three-judge court and allowing amendment and intervention.

withdrawal liability. In light of the extensive analysis of the Multiemployer Act in *R.A. Gray* and subsequent denials of certiorari, this Court should summarily affirm the decision of the court below rejecting a secondary attack upon the Multiemployer Act under the Takings Clause as well as other meritless challenges to the pension insurance program.[3]

A. Congress Acts to Protect Employees' Pension Benefits.

In 1974 Congress enacted ERISA. "Among the principal purposes of this 'comprehensive and reticulated' statute was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *R.A. Gray*, 104 S. Ct. at 2713 (citations omitted).

To achieve this goal of protecting "anticipated retirement benefits," Congress created the PBGC to administer separate plan termination insurance programs for single-employer plans and for multiemployer plans. Although

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[3] The Court also observed in *R.A. Gray* that prospective application of the Multiemployer Act had been upheld by all of the courts of appeals addressing the issue. 104 S. Ct. at 2717 n.7. Subsequently, the Court has denied certiorari in four cases in which courts of appeals rejected challenges to the constitutionality of the Multiemployer Act's prospective operation. Peick v. PBGC, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984); Republic Industries, Inc. v. Teamsters Joint Council, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984); Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc., 725 F.2d 843 (2d Cir. 1984), *cert. denied*, 104 S. Ct. 3554 (1984); Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Incorporated, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, No. 84-1443 (April 22, 1985). In *Peick*, *Republic Industries*, and *Thompson*, the Takings Clause was directly at issue. But for the anomaly of direct appeal under the three-judge court statute, 28 U.S.C. § 1253, it seems likely that the present case would similarly be resolved by a denial of certiorari.

the PBGC's obligation to pay benefits to participants in single-employer plans took effect immediately upon enactment of ERISA, the payment of guaranteed benefits by the PBGC to participants in terminated multiemployer plans was not to become mandatory until January 1, 1978. *See id.* During the period between the enactment of ERISA and January 1, 1978, the PBGC was to have discretionary authority to pay benefits in terminated multiemployer plans. *Id.*[4]

Congress extended the date on which PBGC's mandatory coverage was to become effective four times. "On each occasion, Congress was providing more time for thorough consideration of the complex issues posed by the termination of multiemployer plans." *Id.* at 2714 n.1.

One of the problems considered by Congress was that employer withdrawals from multiemployer plans shifted the responsibility for funding plan benefits to a reduced number of remaining employers, thereby increasing the pressure for additional withdrawals and threatening the plans' viability. Congress therefore sought "an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities." *Id.* at 2714 n.3. The Multiemployer Act's amendments to ERISA were designed to effect Congress' determination that benefits in multiemployer plans are best protected by a regulatory scheme which lessens the need for insurance by "improv[ing] the financial condition" of individual plans. H.R. Rep. No. 869, Part I, 96th Cong., 2nd Sess. 57, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2925, 2931.

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[4] To fund the insurance program for multiemployer plans, Congress assessed covered plans a premium payable to the PBGC and provided that "any employer withdrawing from a multiemployer plan was subject to a contingent liability [to the PBGC] that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits." *Id.*

In furtherance of this regulatory goal, the Multiemployer Act provides a system of withdrawal liability, which is an obligation of an employer that runs in favor of the plan from which it withdrew.[5] 29 U.S.C. § 1381. The Act also provides for faster funding of promised benefits; 26 U.S.C. § 412, 29 U.S.C. § 1082; and, in some cases, benefit reductions; 29 U.S.C. §§ 1425, 1441. The PBGC continues to insure benefits for participants in multiemployer plans, 29 U.S.C. § 1322A. However, the PBGC's funds for payment of insured benefits are now available for loans to insolvent plans, so that a plan in temporary financial difficulty may continue rather than terminate. 29 U.S.C. § 1431. Finally, annual premiums from covered multiemployer plans were increased over a nine-year period from $.50 to $2.60 per participant. 29 U.S.C. § 1306(a)(3)(A)(ii, iii).

B. The Trustees challenge the constitutionality of ERISA and, later, of the Multiemployer Act.

On June 17, 1975, John Connolly, *et al.*, trustees of the Operating Engineers Pension Trust, filed their original complaint seeking: (1) recovery of premiums paid to the PBGC, (2) a declaratory judgment that the Pension Trust was not covered by the insurance program, and (3) a permanent injunction restraining the PBGC from enforcing the statute against the Pension Trust. On August 16, 1982, the Trustees filed their amended complaint alleging, *inter alia*, that withdrawal liability is an unconstitutional taking of property without just compensation.

Thereafter, appellant Woodward Sand moved to intervene in this case. On December 14, 1982, the district court granted permissive intervention.[6]

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[5] "Withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of plan assets." *R.A. Gray*, 104 S. Ct. at 2715.

[6] On July 18, 1984, the President signed into law the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. Section

On May 4, 1984, the three-judge court issued its opinion that the Multiemployer Act is facially constitutional. Woodward Sand J.S. at A-15. On December 4, 1984, the court entered its judgment. Woodward Sand J.S. at A-1.

ARGUMENT

I. Congressional imposition of withdrawal liability to protect pension plan stability does not violate the Takings Clause.

In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), this Court held that whether a particular governmental action effects a taking requiring compensation "depends largely upon the particular circumstances." (Citations omitted.) The court below correctly ruled that the "particular circumstances" of this case do not give rise to an unconstitutional taking of property without compensation.

The court below rejected appellants' Takings Clause challenge to this congressional enactment affecting, as it said, "a mere contractual arrangement," Connolly J.S. Appendix at 8. Relying on this Court's decision in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), the court decided that the Takings Clause does not apply to the contract rights involved in the case at bar. On this basis, the court below concluded that appellants' contractual arrangement is not property

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558(a) of that Act advances the effective date of the Multiemployer Act's withdrawal liability provisions to September 26, 1980, the date of its initial enactment. Woodward Sand claims that its obligation to contribute to the Pension Trust ceased in "September 1980 (although the date is in dispute)." Woodward Sand J.S. at 6. If its obligation to contribute ceased prior to September 26, 1980, then Woodward Sand has no withdrawal liability and may not have any standing to participate in this case.

within the meaning of the Takings Clause. *See Peick v. PBGC*, 724 F.2d at 1274-1276.

Even were it concluded that the contractual right displaced here is "property" within the meaning of the Takings Clause, no compensable taking has occurred here.[7] The history of Congress' actions in the area of pension law negatives any contention that Woodward Sand or any employer had a "reasonable investment-backed expectation," *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 124, that its contracts were not subject to regulation. Congress first announced its intention to regulate the contractual relations between participating employers and multiemployer pension plans when it enacted ERISA in 1974. Even prior to 1974, federal regulation of pension benefits served to put employers on notice that they were subject to congressional regulation if they chose to offer deferred compensation to employees.[8] *See Peick v. PBGC*, 724 F.2d at 1272. The

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[7] The Court has recently recognized that a threshold constitutional question in a Takings Clause case is one of "affirmative legislative power." United States v. Locke, 53 U.S.L.W. 4433, 4439 (April 1, 1985). In *Locke*, the Court rejected a Takings Clause challenge to a federal enactment requiring the forfeiture of mining claims by those who fail to comply with annual filing requirements. The Court relied heavily on due process analysis and case law, such as *R.A. Gray, supra*, recognizing that "Legislation readjusting rights and burdens is not unlawful solely because it upsets settled expectations," quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976).

After applying a due process analysis in holding that "Congress was well within its affirmative powers in enacting" the legislation at issue the Court briefly examined under the Takings Clause "the substantive effect" of the legislation upon those who were deprived of their property, and upheld the law. *Locke*, 53 U.S.L.W. at 4439.

[8] Section 165(a) of the Internal Revenue Code of 1939 (now section 401 of the Internal Revenue Code of 1954, 26 U.S.C. § 401); section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5); Welfare and Pension Plans Disclosure Act of 1958, 29 U.S.C. §§ 301-309, *repealed by* ERISA § 111(a)(1), 29 U.S.C. § 1031.

specific method of regulation at issue here, the withdrawal liability provisions, was enacted in 1980, after six years of regulatory experience under ERISA. In sum, the pervasive and extensive history of federal pension legislation apprised employers that they could no longer rely on their contracts to immunize any "reasonable, investment-backed expectations" against legislative modification. *Cf. National Railroad Passenger Corp. v. A.T. & S.F. Railway*, 53 U.S.L.W. 4285 (March 18, 1985).

Woodward Sand argues that Congress should "appropriate and spend money" if it wishes to strengthen the financial condition of multiemployer pension plans. Woodward Sand J.S. at 12. The Takings Clause does not, however, require the Government to "regulate by purchase." *See Andrus v. Allard*, 444 U.S. 51, 65 (1979). Neither does imposing liability on withdrawing employers create a burden "which, in all fairness and justice, should be borne by the public as a whole." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980), *quoting Armstrong v. United States*, 364 U.S. 40, 48 (1961). Rather, the withdrawal liability provisions require the withdrawing employers to complete funding their shares of the plan's unfunded liabilities. *R.A. Gray*, 104 S. Ct. at 2714 n.3, 2715.[9] Accordingly, there can be no doubt that the Multiemployer Act passes constitutional muster under the Takings Clause. *See Republic Industries, supra*, 718 F.2d at 642-643.[10]

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[9] In fact, the contention that other sources of revenue should be used to "create a central reserve system to assist financially ailing plans" was presented to Congress by Mr. Jett, counsel for appellant Trustees. *Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor*, 96th Cong., 1st Sess. 470 (1979). Congress has, of course, rejected this approach.

[10] Appellants also contend that the Multiemployer Act is unconstitutional because it effects a "taking" for a "private," as opposed

II. The multiemployer pension insurance program, including the imposition of premiums, is constitutional.

The Trustees also argue in this appeal that the requirement that the Pension Trust pay premiums to the PBGC to support the multiemployer termination and insolvency insurance programs violates the Due Process Clause. However, the Trustees cite no case supporting this proposition. On the contrary, this Court long ago upheld the constitutional validity of legislated insurance programs. *Noble State Bank, supra*; *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917); *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937). Therefore, the decision below is consonant with dispositive precedent and it should be summarily affirmed.

Finally, the Trustees contend that Congress delegated to the PBGC unconstitutionally broad authority between 1974 and 1980 with respect to the discretionary payment of multiemployer plan benefits. Despite the Trustees' protestations of overbreadth, Congress delineated a "clear, intelligible principle," *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928), to guide the PBGC in the exercise of its discretionary authority under former 29 U.S.C. § 1381(c)(2) (1976) (now 29 U.S.C. § 1461(c)(2)). That section stated that the PBGC is to pay benefits if it determines "that the payment by [the PBGC] of benefits guaranteed under [Title IV of ERISA] with respect to that plan will not jeopardize the payments the [PBGC] anticipates it may be required to make in connection with [the mandatory guarantee program]." Congress legislated discretionary rather than mandatory coverage for multiemployer plans prior to 1980 because it needed "time for thorough consideration of the complex

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to a "public," use. This contention is clearly insubstantial. *See Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984).

issues posed by the termination of multiemployer pension plans." *R.A. Gray*, 104 S. Ct. at 2714 n.1. In these circumstances, the delegation of discretionary authority was a reasonable means of achieving congressional aims and it "must be judged according to common sense and the inherent necessities of governmental coordination." *J.W. Hampton*, 276 U.S. at 406.[11]

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[11] The Trustees' argument that the discretionary authority granted the PBGC between 1974 and 1980 violated the principle of the separation of powers also fails to raise a substantial federal question deserving of plenary consideration. Under former 29 U.S.C. § 1381(c)(1) (1976), the PBGC was required to "notify the Committee on Education and the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate" whenever it exercised its discretionary authority. However, the constitutional scheme of the separation of powers does not require a "hermetic sealing-off of the three branches of government from one another." Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment) (dictum). The requirement that Congress be notified is simply one of those "formal reporting requirements . . . well within Congress' constitutional power." I.N.S. v. Chadha, 103 S. Ct. 2764, 2786 n.19 (1983).

CONCLUSION

Long settled principles and authoritative decisions of this Court resolve the issues raised in this appeal. This Court should summarily affirm the decision of the three-judge court.

Respectfully submitted,

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No. 84-1555 AND No. 84-1567

Office-Supreme Court, U.S.
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, ET AL., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

JOINT APPENDIX

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No 84-1555 Docketed Mar. 27, 1985.
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Probable Jurisdiction Noted and Cases Consolidated June 10, 1985.

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BEST AVAILABLE COPY

JOINT APPENDIX

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DOCKET ENTRIES

6/17/75

1. Fld complt. Issd summs.

* * *

9/2/75

5. Fld Detf's ANSWER to Complt

* * *

12/5/75

8. Fld pltfs' notc of motn of & motn of pltfs' for S/J, alternative applic for convening of 3-judge crt.

* * *

9. Fld deft Stip re motn for S/J.

10. Fld pltfs' memo of P/A in support of motn for S/J.

12/30/75

11. Fld Stip for Deft re motn for S/J.

12. Fld Deft's memo of P/A in oppos to Pltfs' motn for S/J & in support of Deft's x-motn for S/J.

12/31/75

13. Fld deft's proof of service by mail, served memo of P/A in oppos to pltfs motn for S/J & in support of defts motn for S/J; memo of P/A in oppos of applic for Convening a 3-Judge Crt; notc of motn & motn of defts for S/J; S/J for deft Pension Benefit Guaranty Corp (proposed); findings of fact & concl of law (proposed).

*12/30/75

14. Fld deft's note of motn & motn retbl 1/19/76 9am of deft for S/J.

15. Fld deft's memo of P/A in oppos to applic for convening a 3-Judge Crt.

* * *

1/9/76

17. Fld pltfs' reply to deft's oppos to motn for S/J; oppos to deft's amended x-motn for partial S/J.

* * *

19. Fld pltfs' reply to oppos to altern applic for convening a Three-Judge Crt.

* * *

1/13/76

21. Fld Stip & ORD deft's note of motn & motn of deft for summary jdgmt & ord for summary jdgmt for deft Pension Benefit Guaranty Corp be amended by substituting the docs attached & read as note of motn & motn of deft for part summary jdgmt & ord for part summary jdgmt for deft Pension Benefit Guaranty Corp.

22. Fld deft Pension Benefit Guaranty Corp's amended note of motn & motn for part summary jdgmt, retble 1/19/76 at 9AM.

1/19/76

23. MIN ORD: hrg pltfs motn for S/J or in altern applic for conveng 3-Judge Crt. deft's motn for S/J. PTC.Crt ORDS motn tkn under subm.

* * *

2/12/76

25. Fld ORD Granting S/J for Pltf's & Deft to return to pltf the sum of $12,043 plus intrest from dt sd sum was pd to deft & sd defts are enjoined from acting in any manner inconsistent with the jdgmt. (Ent 2/12/76 m/cpys & ntfd prtys)

2/18/76

26. Fld S/J for pltfs & ORD thereon that S/J be in fv pltfs & agnst deft, that pltfs recvr from deft the sum of $12,043.00, + intrest, atty fees & costs; Fur Ord that sd Pension Plan is a contribution plan w/i the meaning of 29 USC §1002(34) & Fur ORD deft, etc are enjoined in any manner inconsistent with the jdgmt. (Ent 2/18/76) JS-6 Mld corrected copy of note of entry. (JM)

* * *

5/11/76

43. Fld ORD Dnyg deft's mot for ord to alter or amnd jdgmt. (Ent 5/12/76)

* * *

7/7/76

45. Fld deft Pension Benefit Guaranty Corp NOTICE OF APPEAL fr judgmt ent 2/18/76 & 5/12/76.

* * *

9/18/78

Recd fm C/A copy of jdgmt reversing & remanding case to U.S. Dist. Crt.

* * *

3/8/79

57. Fld copy frm Supreme Crt of the U.S. ORD: this Crt that the sd petn & the same is hereby DEN.

3/19/79

58. MIN ORD: Filing & Spreading of the 9th Cir Mandate. Crt ORD reversing & remanding this matter fld & Spread. The matt fur instrucs cnsl to fl a timely notc motn as to their req for a Three Judge designated Crt. (ENT 3/27/79)

* * *

3/20/79

60. Fld notification & req for disign of three judgmt Crt.

4/25/79

61. Fld pltf's suppl memo re appl for conv 3-judge crt.

5/7/79

62. Fld dft's response to suplmntl memo re appl fr conveng a 3 jdg crt.

9/14/79

63. Fld ORD decling the trustees mv for convocatn of a 3-judge crt to hr its constitutnl claim that regulatns of Pension Benefit Guaranty Corp infringe upon their right to contract & deprive them of property w/o due process (Ent 9-17-79) mld cpys & notcs

9/26/79

64. Fld pltf's P&A in supp of motn to reconsider & amd ord re three-judge crt

65. Fld pltf's motn to reconsidr & amd ord re three-judge crt

66. Fld pltf's aff of Wayne Jett

* * *

10/22/79

68. Fld pltf's reply in supp of mtn to reconsider & amd ord re 3-Judge crt

*10/15/79

69. Fld deft's oppos to mtn to reconsider & amd ord re 3 Judge crt

10/29/79

70. MIN ORD: pltf's mtn to reconsider & to amd ord re 3 Judge Crt; amd to three judge court; mtn is DENIED

11/1/79

71. Fld deft's notc of mtn &mtn for S/J

72. Fld deft's memo of P&A in supp of mtn for S/J

11/9/79

73. Fld pltf's oppos to mtn for S/J

11/16/79

74. Fld deft's rply to pltfs oppos to mtn for S/J

11/19/79

75. MIN ORD: deft's mtn for S/J, crt to mk dec af C/A has ruld

1/21/80

Rec'd fr C/A a copy of ord that petn for writ of mandamus is denied

11/7/80

76. Fld deft suppl. memo of P&A in suppt of mot for S/J

3/24/81

77. Fld Fndgs of Fact & Concls of Law (DWW)

78. Fld ORD (DWW) grtg mot of Pension Benefit Guaranty Corp for S/J in fav of deft & agnst pltfs in their capacities as Trustees of the Operating Engrs Pension Trust. (ENT 3-26-81) Mld cpys & notcs to prtys.

* * *

*4/24/81

81. Fld pltf's JT NOTC OF APPEAL to 9th Cir C/A frm Ord ent 3-26-81 $70.00 fldng & docket fees pd.

* * *

5/13/82

84. Fld notc of hrg on fi & spread jdmt of C/A, retnble 6/21/82, 9AM.

*5/5/82

85. Fld cpy of USCA ord reversing & rem w/directns the jdmt of USDC, fld & ent 4-9-82.

6/21/82

86. MIN ORD: Crt ORD(DWW) the mandate frm USCA reversing & rem w/directns the decisions of this crt decision be fld & spread on the minutes of this court; Crt will sign form of ord subm re: notif of 3 Judge Court. (ENT 6-24-82) MD JS/5.

6/21/82

87. Fld notfcatn & req for desig of 3 judge crt.& ORD(DWW) that note be fld & cpys mld to chief judge J. Browning & cnsl of rec.

7/26/82

88. Fld pltfs note of mot & mot fr lv to fi lst A/C, retnble 8-16-82, 9AM

89. Fld pltfs memo of P&A In suppt of mot for lv to fi lst A/C

8/16/82

90. Fld pl'f's lST AMD COMPLT, issd sms.

*8/11/82

91. Fld plts, reply in suppt of mot to lv to fi lst and complt.

92. Fld PBGC's req fr lv to fi opp late

93. Fld PBGC's opp to pltfs' mot ft lv to fi lst and complt

94. MIN ORD: Hrg on pltf's mot fr lv to fi lst and complt hld; Crt(DWW) mot GRANTED; ea of the ptys in all future fi subm sufficient copys fr each of the judges w/intials reflected on its face.

9/27/82

95. Fld R.Freeman's declar in supp of mot to intervene.

96. Fld Intervenor's note of mot & mot to intervene

97. Fld Intervenors' memo of P&A In suppt ofmot to intervn; req for judical note.

* * *

10/4/82

99. Fld Pltfs' Statement of non-oppos to motn to intervene.

10/12/82

100. Fld deft's oppos to motn to intervene.

10/18/82

101. Fld Intervenors' reply brief in suppt of motn to intervene.

102. Fld Intervenors' suppl declaration of Richard M. Freeman in Sppt of motn to intervene.

* * *

11/15/82

107. Fld deft's ANSWER to 1st A/C.

11/10/82

108. Fld Pltfs' response to arguments concerning intervention.

11/29/82

109. Fld Stip & Ord (DWW) that grants of PBGC motn will serv the end of justice & pltf do not opp the granting of PBGC motn & motn of deft to set aside deflt vacated (ENT 11/30/82) Mld cpy

12/6/82

110. MIN ORD: intervene motn is submitted

12/14/82

111. Fld ORD(DWW) applicants' motn for interventn as a mttr of right undr Rule 24(a)(2) is DENIED. Applicants' motn to permissively intervene undr Rule 24(b)(2) is GRNTED on condition that they do not litigate beyond the scope of pltfs' First Amended Complaint. (ENT 12/15/82). Mld cpys/notes.

2/10/83

112. Fld pltfs CMPLNT IN INTERVENTION.

* * *

5/13/83

114. Fld pltfs P&AS in suppt of motn fr S/J.

115. Fld pltfs declartn of Leo A. Majich.

116. Fld pltfs notc of motn & motn fr S/J retnbl 6/6/83, 9 am.

117. Fld pltfs declartn of Joseph H. Seymour.

5/16/83

118. Fld intervenors declratn of George N. Dumas.

119. Fld intervenors declratn of Anne Vaughan.

* * *

6/23/83

127. Fld intervenors notc of motn & motn for S/J.

6/23/83

128. Fld intervenrs memo of P&A in suppt of motn fr S/J.

129. Fld intervenrs declratn of George S. Howard, Jr.

* * *

6/28/83

132. Fld pltfs notc of motn & motn for protectv ord agnst fur dscvry retnbl 7/11/83, 9 AM.

133. Fld deft memo in suppt of motn to strike declratns & exhs fld by pltfs & intervenors.

134. Fld deft notc of motn & motn to strike declratns & exhs fld by pltfs & intervenors.

135. Fld deft memo in suppt of applic fr ord shrtng ti fr hrng on motn.

136. Fld deft applif fr ord shortng ti fr hrng on motn.

137. Fld pltfs' P&A in suppt of motn fr protectv ord agnst fur dscvry.

138. Fld ORD (DWW) that motn fr P/O agnst fur dscvry by deft shall be placed on cal fr hrng on 7/11/83, 9 AM.

139. Fld pltfs' opp to deft's motn to strike.

7/1/83

140. Fld intervenors opp of pltfs in-interventn to deft Pension Benefits Guaranty Corp's motn to strike exhs fld by pltfs & intervenors.

141. Fld intervenors respo in suppt of pltf's motn fr protectv ord agnst fur dscvry.

* * *

7/12/83

142. Fld deft ANSWER TO CMPLNT.

* * *

145. Opp to mont fr protectv ord agsnt fur dscvry, Defendant

7/11/83

Crt & ensl confer & Crt hrs oral argumnt & deems motn fr protectv Ord & agnst fur dscvry submitted. MO

7/12/83

146. Declar of Peter H. Gould.

7/25/83

147. Ord denying motn to strike pltf's exhs is DENIED. Deft's motn to strike intervenor's exhs is DENIED. Pltfs' motn fr Protectv Ord is DENIED w/o prej. Issd

148. Ord of Crt will not consider any fur delays of motns fr s/J & Pension Benefit Guaranty Corp will file a respo to merits c^{f} these motns w/in one week of ord of face deflt.

8/2/83

149. Oppos to motn fr S/J. Defendant

* * *

8/10/83

167. Ord motn be cont'd frm 8/15/83 to 10/24/83, 9AM. No fur conts will be granted. Issd

8/11/83

168. Reply memo of intervenors to deft's opp to motn fr S/J. Plaintiff

8/16/83

169. Reply memo in suppt of motn fr S/J. Plaintiff

* * *

8/31/83

171. ORD that deft's otn fr a recon is DENIED & crt suspends all dscvry until S/J motn is decided.

* * *

9/13/83

176. Ord that cont of hrng in case was solely fr purpose of permitting PBGC to free one of its attys to argue case & was not fr purpose of allowing addit'l dscvry or recv'g addit'l briefing. Motn to permit fur dscvry is DENIED. Issd

* * *

10/24/83

181. MO: Pltfs & intervenors mtns for s/j argued & deemed subm.

* * *

5/1/84

189. ORD granting s/j to deft. (ENT 5-2-84) Mld cpys & notc. JS 6

5/17/84

190. Suggestion for modif of opinion & ent of jdmt. Deft.

5/23/84

191. Opp to pension benefit guaranty's suggestn fr modif of opinion & entry of jdmt-pltf

5/22/84

192. Reply to defts suggetn for modif of opinion & ent of jdmt-pltf

* * *

11/3/84

202. Judgmnt & ORD in favor of deft. Deft shall recover from pltfs its costs incurred during pendency of litigation & from pltfs in-intervent its costs of litigation of issues argued by pltfs-in-intervent. (ENt 12/4/84) mld copys/notes.

12/17/84

203. Note of mot to altr or amnd jdmt 2-4-85 9:00am deft

Memo of P&A in suppt of mot to alter or amnd jdmt deft

1/3/85

204. Pltf's opp to deft's mot to alter or amd jgmt. 2-4-85 at 9 AM

* * *

1/31/85

212. Pltfs-in-intrvntn's NOTC OF APPEAL to the U.S. Supreme Crt frm final jdmt ent 12/4/84. Billed for $5.00 flng fee.

1/31/85

213. Pltf's NOTC OF APPEAL to the U.S. SUPREME COURT frm fin jdmt ent 12/4/84. $5.00 flng fee

* * *

3/20/85

215. Pltf's NOTC OF APPEAL to U.S. SUPREME COURT frm fin jdmt ent 12/4/84. $5.00 flng fee pd.

* * *

COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTION

[Filed June 17, 1975.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS,
JOHN C. MAXWELL, JAMES J. KIRST,
C. WILLIAM BURKE,
KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT,
HAROLD EDWARDS, DONALD E. MIER,
WILLIAM C. WAGGONER, RICHARD GANNON
and ALFRED HARRISON,
each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION
a non-profit corporation established within the Department of Labor of the United States of America.

Defendant.

1. The jurisdiction of this Court is invoked under Section 4003(f) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1303(f)].

2. Plaintiffs JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON (herein called the

"Trustees") are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust (herein called the "Trust"), and bring this action in their official capacities as such.

3. The Trust is a joint labor-management trust created and existing in conformance with Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 [29 U.S.C. §186(c)(5)]. The principal office of the Trust is located in the County of Los Angeles, State of California.

4. Defendant Pension Benefit Guaranty Corporation (herein called the "Corporation") is a non-profit corporation established within the Department of Labor of the United States of America by Section 4002 of the Employee Retirement Income Security Act of 1974 [29 U.S.C. §1302].

5. The Trustees administer a pension plan (herein called the "Plan") established pursuant to the Trust. A written Agreement Establishing the Operating Engineers Pension Trust (herein called the "Trust Agreement") was executed in 1960 by certain employers (herein called the "Employers") and the International Union of Operating Engineers, Local No. 12, (herein call the "Union"). At all times the Trust Agreement has contained a provision in Article II, Section 7, thereof as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee

> as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

The collective bargaining agreement between the Union and the Employers at all times has bound the Employers to abide by the Trust Agreement and to pay a stated amount to the Trust with respect to each hour worked by (or paid) each employee covered by the agreement.

6. At all times the Plan has contained a provision in Article VII, Section 4 thereof, as follows:

> "This Pension Plan has been adopted on the basis of the actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not

have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments of contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

7. At all times the Plan has contained a provision in Article VIII, Section 2, thereof as follows:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

8. The Corporation has no authority over any pension plan which provides for an individual account for each

participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account (herein called a "defined contribution plan"), unless the defined contribution plan promises a fixed benefit and the employer or his representative participated in the determination of that benefit.

9. The Plan is a defined contribution plan under which no fixed benefit is promised.

10. The Trustees heretofore applied to the Corporation for a determination that the Plan is a defined contribution plan and that the Corporation has no authority over the Plan. A true copy of the Trustees' written request for determination submitted to the Corporation is attached hereto as Exhibit "A" and by reference incorporated herein.

11. The Corporation has unlawfully and arbitrarily refused to determine the Plan to be a defined contribution plan, and has unlawfully and arbitrarily determined the Plan to be a defined benefit plan over which the Corporation exercises substantial control. A true copy of the written determination by the Corporation is attached hereto as Exhibit "B" and by reference incorporated herein.

12. The exercise of authority by the Corporation over the Plan has damaged the Trustees, and threatens further damage to the Trustees throughout the indefinite future, as follows:

(a) The Trustees have been required to pay and have paid to the Corporation the sum of $12,043.00 as a termination insurance premium in order to avoid assessment of a late payment charge not exceeding one hundred percent (100%) of said amount, plus

interest, and the Corporation threatens to require additional payments each in a similar or greater amount annually throughout the indefinite future.

(b) The Corporation has impaired the discretion and authority of the Trustees to administer the Plan in accordance with the Trust Agreement and the Plan by purporting to regulate, control and approve or disapprove modifications of the Plan by the Trustees.

(c) The Corporation's exercise of authority over the Plan violates and invalidates the express terms of the Trust Agreement and the Plan, which define the limit of the Employer's liability as the payments required by the collective bargaining agreements between the Employers and the Union, and substitutes therefor the unknown future cost of providing benefits described in the Plan. The Corporation requires the reporting of any amendment of the Plan which may decrease the benefits payable to any participant of the Plan, and the Corporation purports to hold the authority to approve or disapprove any such amendment of the Plan. Pursuant to the Corporation's action, any amendment to the Plan which may increase the benefit payable to any participant of the Plan would correspondingly increase the liability of the Employers. Any such increase in liability of the Employers will cause bargaining between the Employers and the Union on the subject of the amendment to the Plan and thereby, deprives the Trustees of the discretion and control of the Plan necessary to perform their duties as fiduciaries to administer the Plan in the interest of the participants and in accordance with the terms of the Trust Agreement and the Plan.

(d) The Corporation imposes on the Employers and all other contributing employers of the Plan the risk of liability to the Corporation in an amount as much as thirty percent (30%) of the net worth of each employer. Further, the Corporation purports to have the authority to require the Employers and all other contributing employers of the Plan to pay to the Corporation substantial sums in amounts presently unknown as premiums to insure against the above-described risk.

13. The Corporation contends that such damages are caused the Trustees and such additional risk and liability are imposed upon the Employers and all other contributing employers of the Plan through the enactment of federal statutory law creating and empowering the Corporation and modifying the rights and obligations of the Employers, the Union, the Trustees and the participants under the pre-existing collective bargaining agreements, Trust Agreement and Plan. The Trustees contend that such contentions by the Corporation are arbitrary and contrary to the express terms of the statutory enactment; further, that the Corporation's contentions directly contravene the express terms of the collective bargaining agreements, the Trust Agreement and the Plan and giving legal effect to such contentions will impair the valuable consensual contract rights of the Employers, the Union, the Trustees and the participants; and, further, that the Corporation's actions and contentions hereinabove described seek and threaten to deprive the Employers, the Union, the Trustees and the participants of their just and lawful property without the due process of law and without just and adequate compensation.

14. The damages to the Trustees caused by the Corporation are continuing and irreparable. The Trustees have no complete remedy at law.

15. By reason of the foregoing, an actual controversy has arisen and exists between the Trustees and the Corporation with respect to wether the Corporation has erroneously applied the law to the facts to determine that the Plan is a defined benefit plan subject to the authority of the Corporation.

WHEREFORE, plaintiffs pray for damages, declaratory judgment and injunctive relief as follows:

1. Damages in the sum of $12,043.00, plus interest from the date said sum was paid to defendant, plus such additional sums, if any, which proof may show were paid to defendant by plaintiffs prior to judgment herein, and interest thereon;

2. A declaratory judgment that the Plan is a defined contribution plan which does not promise a fixed benefit and which is not subject to the coverage or authority of defendant; and

3. A permanent injunction restraining defendant, its agents, employees, representatives and all persons in concert with them from acting in any manner inconsistent with the judgment of this court herein to interfere with the rights of plaintiffs, their agents, employees, representatives and successors.

DATED: June 16, 1975

WAYNE JETT
Attorney for Plaintiffs

EXHIBIT A

WAYNE JETT
Lawyers

WAYNE JETT
ALBERT RUSH
TIMOTHY P. SULLIVAN

File No. 102

April 10, 1975

PENSION BENEFIT GUARANTY CORPORATION
P. O. Box 7119
Washington, D.C. 20044

SECRETARY OF LABOR
U.S. Department of Labor
P.O. Box 176
Washington, D.C. 20044
Attention: Labor Management Services Administration
Office of Employee Benefits Security

Re: Request for Determination of Status as
Defined Contribution Plan
Operating Engineers Pension Trust
Department of Labor WP-154662
Employer Identification No. 95-603-2478

Gentlemen:

This firm is legal counsel for the Board of Trustees of the Operating Engineers Pension Trust. Pursuant to the instruction and authorization of the Board of Trustees, this letter hereby requests determination of whether the Pension Plan of the Operating Engineers Pension Trust is an "individual account plan" ("defined contribution plan") or a "defined benefit plan" for the purposes of Section 4021 (b) (1) of the Employee Retirement Income Security Act of 1974 ("the Act"). The view of the Board

of Trustees is that the Pension Plan is an "individual account plan".

STATEMENT OF THE FACTS

The principal office of the Operating Engineers Pension Trust ("the Trust") is located at 3055 Wilshire Boulevard, Suite 200, Los Angeles, California 90010. The Department of Labor WP number of the Trust is WP-154662. The Employer identification number (EIN) of the Trust is 95-603-2478. The Pension Plan ("the Plan") of the Trust has been in existence since June 1, 1960. The Trust is tax exempt under the provisions of Internal Revenue Code Section 501(a) and the Plan is a qualified pension plan within the meaning of IRC §401(a).

The Trust is a joint labor-management trust formed and operated in compliance with Section 302(c) (5) of the Labor Management Relations Act of 1959 [29 U.S.C. §186(c) (5)]. The written Agreement Establishing the Operating Engineers Pension Trust (the "Trust Agreement") was executed December 13, 1960, on behalf of the International Union of Operating Engineers, Local Union No. 12, ("the Union") a labor organization representing employees in an industry affecting commerce, and certain employer associations, including the Associated General Contractors of America, Southern California Chapter, and other employer associations ("the Employers") representing employers in the construction industry in Southern California and Southern Nevada. The Trust was established by the parties to the Trust Agreement pursuant to collective bargaining agreements between the Union and the Employers which obligated the Employers to pay certain stated amounts of contributions into a trust to be organized for the purpose of receiving such contributions. The amount obligated by each signatory employer commenced at $.05 per hour of employment in

1960. That rate of contribution has been renegotiated through the process of collective bargaining at various intervals since 1960, and the currently effective rate of contribution is $1.50 per hour worked (or paid) as to each covered employee. The applicable provisions of the collective bargaining agreement currently in effect in Southern California has substantially the same content as contained in various collective bargaining agreements in effect since 1960. The current provisions contained in Article IX, Paragraph A, and Appendix B of the Master Labor Agreement between Southern California General Contractors' associations and the Union are as follows:

> "A pension fund known as the Operating Engineers Pension Trust has been established by the Contractors and the Union by an Agreement and Declaration of Trust dated December 13, 1960, and subsequently amended by the parties to this Agreement. The Contractors agree to abide by said Agreement and Declaration of Trust and further to make payments to the Fund in the amount designated in Appendix B of this Agreement. Participation by the Contractors in said Trust shall be for the duration of this Agreement and any renewals or extensions thereof, or for the period workmen are employed under the terms of this Agreement."

"APPENDIX B"

CONTRIBUTIONS PAYABLE TO TRUST FUNDS

Effective Date July 1, 1974

PENSION TRUST (Article IX) $1.50

> "... The above contributions will be made on the basis of straight time or overtime hours worked or paid each employee under the terms of this Agreement."

The Trust Agreement provides for administration of the trust fund by a Board of Trustees ("the Trustees"). One-half of the total number of Trustees on the Board of Trustees are appointed by the Union, and the remaining Trustees are appointed by the Employers. The Trustees hold, control and manage the assets of the Trust either directly or in the name of a corporate co-trustee in a common pool for the exclusive benefit of employees, retired employees and their beneficiaries pursuant to the provisions of the Plan. No employee, retired employee or beneficiary is entitled to receive any part of the contributions made or required to be made by an employer in lieu of the benefits provided by the Plan. No person has any right, title or interest in the assets of the Trust except as specifically provided in the Trust Agreement or in the Plan. Participants and beneficiaries are restrained by the Trust Agreement from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of any right or interest under the Plan. Interests under the Plan are not subject to transfer by operation of law or otherwise, and are exempt from legal or equitable process to the fullest extent permissible by law.

The Trust Agreement limits the scope of liability of the contributing employers in Article II, Section 7, thereof as follows:

> *"Neither the Employers nor any Signatory Association, nor officer, agent, employee or committee member of the Employers, or any Signatory Association, shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint Venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter*

> *provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the collective bargaining agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."* (Emphasis added.)

Article III of the Trust Agreement relates only to the collection of contributions obligated by the collective bargaining agreements, the employers' obligations to pay promptly, and remedies upon default by any employer.

The original Plan was attached to the Trust Agreement executed by the Union and the Employers. Thereafter, the Plan has been amended from time to time by the Trustees in accordance with the provisions of the Trust Agreement and the Plan.

The Plan provides for the accumulation of Prior Service Credits by each individual participant based upon yearly intervals of employment in the industry organized by the Union prior to the date the Plan was established (June 1, 1960). In addition, the Plan provides for the accumulation of Pension Credits by each individual participant, based upon one Pension Credit for each 1,000 hours of employment by a contributing employer after the date of commencement of the Plan at the rate of contribution stated in the Master Labor Agreement. However, if the contributing employer of the particular participant is obligated to pay contributions at a rate different from the

Master Labor Agreement rate, then said participant accumulates Pension Credits in direct proportion to the rate of contributions made on his behalf as compared to the Master Labor Agreement rate. For example, if a participant works 1,000 hours for an employer obligated to pay the Master Labor Agreement rate of $1.50 per hour, the participant acquires one Pension Credit for contributions amounting to $1,500.00. If another participant works for an employer obligated to pay only $1.00 per hour, then that participant acquires one Pension Credit for each 1,500 hours of employment. Thus, the Trustees maintain an individual account of hours worked by each participant and the rate of contributions paid by the employer for each such hour worked by that participant in the Plan.

The Plan provides for the payment of Normal Retirement, Early Retirement, Disability Retirement, Lump Sum Benefit at Retirement and Death benefits to a qualified participant or his beneficiary. The retirement benefits payable are based directly upon the exact number of hours worked by the individual participant under the Plan and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits. For example, a participant who qualifies for Normal Retirement on April 1, 1975, with 23.317 Pension Credits and 10.5 Prior Service Credits would be entitled to a monthly pension for the remainder of his life equal to 23.317 time $15.50 plus 10.5 times $8.00, or a total of $445.00 per month. Early Retirement and Disability Retirement benefits are computed in the same manner, except that Early Retirement benefits are actuarially reduced based upon the individual participant's age at the date of retirement. Death benefits are the payment of the monthly pension amount to a designated beneficiary for a period of ten years (plus, in the case of active participants, a lump sum equivalent to the lump sum benefit at

retirement described below), less the number of pension payments made to the participant prior to death, or at the participant's option a lump sum equal to $1,500.00 times the number of accumulated Pension Credits, less any retirement benefits paid prior to death. Also, the Plan provides for payment of lump sum benefits at retirement equal to $250.00 times the number of accumulated Pension Credits, not exceeding ten, of the individual participant.

Since its inception and presently, the Plan has contained provisions limiting the liability of the contributing employers in Article VII, Section 4, thereof as follows:

> *"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly, to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise there shall be no liability upon the Board of Trustees, individually or collectively, or*

> *upon the Employers, Signatory Associations, Individual Employer, or the Union to provide the benefits established by this Plan if the Pension Fund does not have assets to make such benefit payments.*" (Emphasis added.)

Further, the Plan has contained since its inception a provision for actuarial review in Article VIII, Section 2, thereof as follows:

> "This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. *It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments.* Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan." (Emphasis added.)

On or before December 2, 1974, the Trust filed Form No. PBGC-1 with the Pension Benefit Guaranty Corporation as if the Plan were included in coverage of the plan termination insurance provisions of the Act. The Trust paid the estimated premium as set forth in Form No. PBGC-1 at that time in order to avoid any possible liability for interest and penalties which may be assessed under the Act in the event the Plan is determined to be a "defined benefit plan".

ANALYSIS

Section 4021 of the Act establishes the coverage of the plan termination insurance provisions (Sections 4001, *et seq.*) and, in Section 4021(b), provides as follows:

> "(b) This section does not apply to any plan —
>
> (1) which is an individual account plan, as defined in paragraph (34) of section 3 of this Act . . ."

Paragraph (34) of Section 3 of the Act provides as follows:

> "(34) The term 'individual account plan' or 'defined contributions plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

> "(c)(1) For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

The Plan appears to be within the definition contained in Paragraph (34) of Section 3 of the Act in that the Plan as described above provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses experienced by the Trust. In accordance with IRC § 401(a)(8), the Plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the Plan. However, forfeitures do occur under certain

break-in-service provisions of the Plan, and the purpose of IRC § 401(a)(8) appears to be to assure that conservative actuarial assumptions are used in designing the Plan. The requirement of Paragraph (34) of Section 3 for "an individual account for each participant" appears to be fully satisfied by current accounting for and recording of each and every hour worked by the individual participant and the concurrent recording of the contribution rate per hour of the related employer. This practice of maintaining the "individual account" is followed in order to achieve an accurate measurement of the entitlement of the individual participant, rather than accounting for actual funds as received on such participant, because the related employer may become delinquent by failure to pay timely contributions on one or more of his employees.

Further, the requirement of Paragraph (34) of Section 3 for "benefits based solely upon the amount contributed" is a clear reference to the "defined contribution" or "money-purchase" approach to providing retirement benefits. By this approach, the employer agrees to make certain payments into a plan, and any benefits to be provided are limited solely to whatever can be purchased with the obligated contribution. This approach contrasts with the "defined benefit" approach by which an employer promises certain benefits upon retirement and thereby becomes obligated to pay into the plan whatever contributions are necessary to provide the promised benefits. The Plan has at all times since its inception in 1960 expressly limited the liability of all contributing employers to the payment of certain contributions defined in the collective bargaining agreements. Article II, Section 7, of the Trust Agreement and Article VII, Section 4, of the Plan are self-explanatory and fully comprehensive in limiting the liability of each contributing employer to payment of the specific rate per hour as bargained for and set forth in each respective collective bargaining agreement.

Based upon the foregoing, it appears that the Plan is an individual account plan as defined in Paragraph (34) of Section 3 of the Act. Thus, the only remaining question is whether Section 4021(c)(1) of the Act in any manner affects the Section 4021(b)(1) exclusion of the Plan from coverage by plan termination insurance. Review of Section 4021(c)(1) indicates this question is properly answered in the negative. Again, Section 4021(c)(1) provides as follows:

> "For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which *a fixed benefit is promised* if the employer or his representative participated in the determination of that benefit." (Emphasis added.)

Certain of the Trustees of the Trust are representatives of the contributing employers, and such Trustees have participated in adopting and amending the various provisions of the Plan relating to design of the benefits program. However, it is clear that the Plan is not one under which "a fixed benefit is promised". The benefits of the Plan are not "fixed" because such benefits are expressly required to vary according to the sufficiency of the obligated contributions to provide for the described benefits. Also, the benefits of the Plan are not "promised" except upon the express conditions set forth in Article II, Section 7, of the Trust Agreement and Article VII, Section 4, of the Plan. Thus, since no fixed benefit is promised by the Plan, Section 4021(c)(1) does not exclude the Plan from the term "individual account plan" for the purposes of Section 4021(b)(1).

CONCLUSION

The Pension Plan of the Operating Engineers Pension Trust is an "individual account plan" or "defined contribution plan" as defined in Paragraph (34) of Section 3 of

the Act for purposes of Section 4021(b)(1) of the Act and is, therefore, excluded from coverage by the plan termination insurance provisions of the Act.

The Trustees respectfully request your written determination of this inquiry. In the event any determination contrary to the above conclusion is tentatively foreseen, we respectfully request an opportunity for an informal conference to discuss the related criteria for determining this matter. Please direct your response to the undersigned at the letterhead address given above.

Very truly yours,

WAYNE JETT

EXHIBIT B

PENSION BENEFIT GUARANTY CORPORATION
P.O. Box 7119
Washington, D.C. 20044

May 21, 1975

WAYNE JETT, ESQ.
Wilshire Centre
Suite 420
3055 Wilshire Boulevard
Los Angeles, California 90010

Dear Wayne:

This is in response to your letter of April 10, 1975 requesting a determination of "whether the Pension Plan of the Operating Engineers Pension Trust is an 'individual account plan' ('defined contribution plan') or a 'defined benefit plan' for the purposes of Section 4021(b)(1) of the Employee Retirement Income Security Act of 1974 ('the Act')."

As a result of our telephone conversation on Friday, May 9, 1975, the legal staff of the Pension Benefit Guaranty Corporation ("PBGC") reexamined the case file and an opinion was also obtained from the PBGC Office of Program and Policy Development. On the basis of the documents submitted by you it appears that the Operating Engineers Pension Trust is a defined benefit plan for the purposes of Section 4021(b)(1).

As you know, Section 4021(b) provides that:

> "This Section does not apply to any plan — (1) which is an individual account plan, as defined in paragraph (34) of Section 3 of this Act . . . ."

Paragraph (34) of Section 3 of the Act provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, an any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The definition set forth in Section 3(34) is limited by Section 4021(c)(1) which provides:

> "For the purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Section III of the Pension Plan sets forth various "pension factors" which are utilized to determine the amount of the monthly benefit a retiree is to receive. In your letter of April 10, 1975 (p. 5) you stated that benefits are determined in the following fashion:

> "The retirement benefits payable are based directly upon the exact number of hours worked by the individual participant under the Plan and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits. For example, a participant who qualifies for Normal Retirement on April 1, 1975, with 23.317 Pension Credits and 10.5 Prior Service Credits would be entitled to a monthly pension for the remainder of his life equal to 23.317 times $15.50 plus 10.5 times $8.00 or a total of $445.00 per month."

This method of computing a participant's pension benefit appears to be a formula based on service and thereby is

within the class of plans we call defined benefit plans, rather than an individual account plan. (See also Section 4021(c)(1) of the Act.)

I hope this information proves helpful to you and will be of assistance in future evaluations of your Pension Plan. If you would like to discuss the matter further, either by telephone or in person, I would be glad to do so.

Sincerely,

HENRY ROSE
General Counsel

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTIONS

[Filed Sep. 2, 1975.]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Defendant.

Comes now, Defendant, Pension Benefit Guaranty Corporation, by its attorneys, and files this answer to the Complaint in this proceeding.

1. Defendant admits the allegations in paragraph (1) of the Complaint.

2. Defendant has no knowledge of and therefore denies the allegations of paragraph (2) of the Complaint.

3. Defendant has no knowledge of and therefore denies the allegations of paragraph (3) of the Complaint.

4. Defendant admits the allegations in paragraph (4) of the Complaint.

5. Defendant has no knowledge of and therefore denies the allegations in paragraph (5) of the Complaint.

6. Defendant has no knowledge of and therefore denies the allegation in paragraph (6) of the Complaint.

7. Defendant has no knowledge of and therefore denies the allegation in paragraph (7) of the Complaint.

8. Defendant admits that there is excluded from the coverage of Section 4021 of the Employee Retirement Income Security Act of 1974 (hereinafter the "Act") "... any plan — (1) which is an individual account plan as defined in paragraph (34) of Section 3 of [the] ... Act ...", but denies the remaining allegations in paragraph (8) of the Complaint.

9. Defendant denies the allegations in paragraph (9) of the Complaint.

10. Defendant admits that Exhibit A to the Complaint is a true copy of a letter received by Defendant but denies the remaining allegations of paragraph (10) of the Complaint.

11. Defendant admits that Exhibit B to the Complaint is a true copy of a letter from Defendant's General Counsel to Wayne Jett, Esq. but denies the remaining allegations of paragraph (11) of the Complaint.

12. Defendant admits that Plaintiff trustees have paid to Defendant the sum of $12,043.00, purportedly in compliance with Section 4007(a) of the Act, but denies the remaining allegations of paragraph (12) of the Complaint.

13. Defendant denies the allegation of paragraph (13) of the Complaint.

14. Defendant denies the allegations in paragraph (14) of the Complaint.

15. Defendant denies the allegations in paragraph (15) of the Complaint.

Further answering, Defendant alleges as follows:

1. The Complaint fails to state a claim for which relief may be granted.

2. Insofar as plaintiffs seek relief for an alleged infringement of their constitutional rights, this suit is premature.

3. Plaintiff has failed to join a party indispensible under Rule 19.

4. The relief sought by Plaintiff cannot be granted because Plaintiff has failed to comply with 28 U.S.C. §§ 2282 and 2284.

5. This Court lacks jurisdiction to decide the constitutional issues sought to be raised in this action.

6. In doing the acts complained of in the complaint, Defendant was duly authorized by and acted under the authority of Title IV of the Employee Retirement Income Security Act of 1974, specifically Section 4021 of the Act, 29 U.S.C. § 1321.

WHEREFORE, Defendant demands judgment in its favor and requests this Court to grant to Defendant such relief as may be meet and proper in the circumstances including but not limited to an award of the costs of this litigation pursuant to Section 4003(e)(5) of the Act, 29 U.S.C. § 1303(e)(5).

Respectfully submitted,

HENRY ROSE
General Counsel

GEORGE B. DRIESEN
Deputy General Counsel

BARBARA S. GUTMANN
Staff Attorney

Attorneys for Defendant,
Pension Benefit Guaranty
Corporation
8701 Georgia Avenue
Silver Springs, Maryland 20910
(301) 427-8112

STIPULATION RE MOTION FOR SUMMARY JUDGMENT

[Filed Dec. 5, 1975.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 75 2037 DWW

JOHN L. CONNOLLY, C.V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Defendant.

IT IS HEREBY STIPULATED by and between the plaintiffs and defendant, each through its respective counsel, as follows:

1. This court has jurisdiction under § 4003(f) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1303(f)] (hereinafter called the "Act").

2. Plaintiffs JOHN L. CONNOLLY, C.V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E.

MIER, WILLIAM C. WAGGONER, RICHARD GANNON and JERRY TRENT, as successor of ALFRED HARRISON (herein called the "Trustees") are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust (herein called the "Trust"), and bring this action in their official capacities as such.

3. The Trust is a joint labor-management trust created and existing in conformance with §302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 [29 U.S.C. §186(c)(5)]. The principal office of the Trust is located in the County of Los Angeles, State of California.

4. Defendant Pension Benefit Guaranty Corporation (herein called "PBGC") is a non-profit government owned corporation established by §4002 of the Act [29 U.S.C. §1302].

5. A written Agreement Establishing the Operating Engineers Pension Trust (herein called the "Trust Agreement") was executed on or about December 13, 1960, by Associated General Contractors of California, Inc., successor to Associated General contractors of America, Southern California Chapter; Building Industry Association of California, Inc., successor to Building Contractors Association of California, Inc., and Home Builders Association of Los Angeles, Orange and Ventura Counties, Engineering and Grading Contractors Association, Inc., successor to Home Builders Institute Inc.; Associated General Contractors of America, San Diego Chapter; San Diego Building Contractors Association, Engineering and Grading Contractors Association, Inc., San Diego Chapter; Associated General Contractors of America, Nevada Chapter; Las Vegas Builders Exchange; Southern Nevada

Home Builders, Inc.; and Federated Employers of Nevada, Inc. (herein called the "Employers") and the International Union of Operating Engineers, Local Union No. 12, (herein called the "Union").

6. Each collective bargaining agreement between the Union and the Employers at all relevant times since the establishment of the Trust has bound the Employers to abide by the Trust Agreement and to pay a stated amount to the Trust with respect to each hour worked by (or paid) each employee covered by the collective bargaining agreement.

7. At all relevant times the Trust Agreement has contained a provision in Article II, Section 7, thereof as follows:

> "Neither the Employers not any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further

> payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

A true copy of the Trust Agreement is attached hereto as Exhibit "A" and by reference incorporated herein.

8. The Pension Plan (herein called the "Plan") of the Trust is an appendix of the Trust Agreement. A true copy of the Plan is attached hereto as Exhibit "B" and by reference incorporated herein.

9. The Plan is an "employee pension benefit plan" within the meaning of §3(2) of the Act [29 U.S.C. §1002(2)], which has been determined by the Secretary of the Treasury to be a plan described in §401(a) of the Internal Revenue Code of 1954 (hereinafter called the "Code") in a letter dated February 7, 1975. A true copy of said letter is attached hereto as Exhibit "C" and by reference incorporated herein.

10. The Trust Agreement in Article V, Section 2, provides that "The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Pension Plan . . . ." Pursuant to Section 3(16) [29 U.S.C. §1002(16)] of the Act the Board of Trustees is the Plan Administrator.

11. At all relevant times the Plan has contained a provision in Article VII, Section 4 thereof, as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any

liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

12. At all relevant times the Plan has contained a provision in Article VIII, Section 2, thereof as follows:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall

take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

13. At all relevant times the Plan has contained a provision in Article III, Section 1, thereof as follows:

"(b) Amount of Normal Pension

The monthly amount of the Normal Pension payable to a Participant who is eligible for a pension in accordance with Section 1(a) of this Article shall be determined by multiplying the numbers (including fractions) of his respective Prior Service Credits and Pension Credits accumulated before his retirement by the appropriate Pension Factor below, unless the Participant's Normal Pension is to be determined in accordance with Section 5 of Article II in which event the provision of that Section shall control:

	Pension Factor
(1) Effective on July 1, 1966:	
Prior Service Credit (per year)	$4.50
Pension Credit (per credit)	3.65

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1966.

(2) Effective on July 1, 1967:	
Prior Service Credit (per year)	$7.20
Pension Credit (per credit)	5.65

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1967.

(3) Effective on July 1, 1968:	
Prior Service Credit (per year)	$7.20
Pension Credit (per credit)	7.95

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1968.

(4) Effective on July 1, 1970:

Prior Service Credit (per year)	$ 7.20
Pension Credit (per credit)	9.00

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1970.

(5) Effective on July 1, 1971:

Prior Service Credit (per year)	$ 7.20
Pension Credit (per credit)	11.00

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1971.

(6) Effective on September 1, 1972:

Prior Service Credit (per year)	$ 8.00
Pension Credit (per credit)	12.00

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on September 1, 1972.

(7) Effective on July 1, 1973:

Prior Service Credit (per year)	$ 8.00
Pension Credit (per credit)	15.50

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1973.

(8) Effective on July 1, 1975:

Prior Service Credit (per year)	$ 8.00
Pension Credit (per credit)	20.00

The above Pension Factors will apply to both Participants and Retired Participants but not to surviving spouses or beneficiaries on the pension rolls on July 1, 1975."

14. At all relevant times the Plan has provided in Article II, Section 2(a), that when a participant is entitled to Prior Service Credits, such participant is:

"(i) . . . entitled to a full year of such credit for each Plan Year he was so employed for 1200 hours or more and if so employed for less than 1200 hours he shall receive 1/1200th of a year for each such hour."

15. At all relevant times the Plan has provided in Article II, Section 3 as follows:

"(a) For employment commencing on and after July 1, 1960, but prior to July 1, 1968, a Participant will receive one Pension Credit for each 1000 hours, and 1/1000th of a Pension Credit for each hour less than a full Pension Credit in which he is employed by an Individual Employer with regard to which contributions are received by the Fund, or are obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(b) For employment commencing on and after June 1, 1968, but prior to July 1, 1970, a Participant will receive one Pension Credit for each $600 of contributions made on his behalf and 1/1000th of a Pension Credit for each 60¢ accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(c) For employment commencing on and after July 1, 1970, but prior to July 1, 1971, a Participant will

receive one Pension Credit for each 0800 of contributions made on his behalf and 1/1000th of a Pension Credit for each 80¢ accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(d) For employment commencing on and after July 1, 1971, but prior to July 1, 1972, a Participant will receive one Pension Credit for each $1,000 of contributions made on his behalf and 1/1000th of a Pension Credit for each 71.00 accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(e) For employment commencing on and after July 1, 1972, but prior to July 1, 1973, a Participant will receive one Pension Credit for each $1,200 of contributions made on his behalf and 1/1000th of a Pension Credit for each $1.20 accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(f) For employment commencing on and after July 1, 1973, a Participant will receive one Pension Credit for each $1,500 of contributions made on his behalf and 1/1000th of a Pension Credit for each $1.50 accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the

Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4."

16. At all relevant times the Plan has been and is a plan:

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to a collective-bargaining agreement between employee representatives and more than one employer, and

(C) under which the amount of contributions made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year, by all employers making such contributions.

17. The Plan currently provides for a benefit of eight ($8.00) dollars for each Prior Service Credit and for a benefit of twenty ($20.00) dollars for each Pension Credit accumulated by each Plan participant and each retired participant.

In order to ascertain the benefit entitlement of a participant, a computerized account of the necessary information is maintained by the Trustees for each Plan participant. Each month the Trustees record the number of hours (including fractions) worked by a participant during the preceding month. In addition, the hourly rate at which an employer is obligated to contribute to the Pension Fund and the amount that an employer is obligated to contribute on behalf of an individual participant for the preceding month is also recorded. The Pension Credits earned by an individual for the preceding month are also recorded.

18. A computer print-out of the information maintained on behalf of each participant shows the number of hours worked each month by an individual, the obligated monthly contribution to be made on behalf of an individual and the monthly accrual of an individual's Pension Credits. These monthly entries are aggregated and presented as yearly totals at the end of each June. It is not possible to determine the amount actually contributed on behalf of an individual participant from the computer print-out of the information maintained for each participant. No other information for the purpose of determining the amount of the pension benefit payable to an individual participant except for identifying information is maintained on an individual participant or is shown on the computer print-out. A sample computer print-out evidencing the information kept for one individual participant in the Plan is attached hereto as Exhibit "D" and by reference incorporated herein.

19. Upon retirement a participant applies to the Trustees for his pension benefit by submitting a Pension Application. A copy of a Pension Application is attached hereto as Exhibit "E" and by reference incorporated herein.

20. In order to determine the benefit entitlement of a retiring participant the Trustees ascertain the number of Prior Service Credits accumulated by the participant on the basis of the Union Membership information contained in the Pension Application, Local membership records are also checked, if necessary, to determine the number of Prior Credits accumulated by a participant since Article II, Section 2(b) of the Plan has at all relevant times provided that a year's membership in good standing in the Union from the period May 1, 1939 to June 1, 1960 establishes the presumption that a participant is entitled to a year of Prior Service Credit for each year of such

Union membership, except that no participant may accumulate more than 20 such Prior Service Credits.

The number of Pension Credits accumulated by a participant is ascertained by consulting the computer printout of the information maintained on each individual. (See paragraph 18, *supra*, and Exhibit "D"). Assuming that the participant has not had a break in service, all such Pension Credits are entered in the "Work Sheet" and multiplied by the current Pension Factor. Prior Service Credits are also entered on the Work Sheet and multiplied by the current Prior Service Credit Factor. A participant's Total Pension Amount is the sum of his Pension Credits times $20.00 and his Prior Service Credits times $8.00. At no time either on the Work Sheet or on the Pension Application form is the amount actually contributed on behalf of a participant determined. A participant's benefit is paid regardless of whether the obligated contributions on his behalf are actually made, provided there are sufficient assets in the Fund.

21. The Pension Factors used to determine the benefit entitlement of Plan participants have been fixed by the Trustees from time to time. By action of the Trustees said Pension Factor was adjusted in 1966, 1967, 1968, 1970, 1971, 1972, 1973 and 1975. In setting the Pension Factor, the Trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual and anticipated employer contributions and delinquencies. A copy of the actuarial recommendations included in the actuarial advice on which the 1975 Pension Factor adjustment was based is attached hereto as Exhibit "F" and by reference incorporated herein.

22. The authority of the Trustees to set benefits and Pension Factors is subject to the powers, duties and limitations of the Trustees as set forth in Article II,

Section 7 of the Trust Agreement and Article VII, Section 4 and Article VIII, Section 2 of the Pension Plan.

23. By letter dated April 10, 1975, the Trustees applied to PBGC for a determination as follows:

> "... whether the Pension Plan of the Operating Engineers Pension Trust is an 'individual account' plan ('defined contribution plan') or a 'defined benefit plan' for the purposes of Section 4021(b)(1) of the Employee Retirement Income Security Act of 1974 ('the Act') ..."

A true copy of said letter dated April 10, 1975, is attached hereto as Exhibit "G" and by reference incorporated herein.

24. By letter dated May 21, 1975, the Office of the General Counsel of the Corporation informed the Trustees as follows:

> "... On the basis of documents submitted by you it appears that the Operating Engineers Pension Trust is a defined benefit plan for the purposes of Section 4021(b)(1)."

A true copy of said letter dated May 21, 1975, is attached hereto as Exhibit "H" and by reference incorporated herein.

25. By letter dated July 8, 1975, the Trustees made demand upon PBGC for return of the sum of Twelve Thousand Forty-three Dollars ($12,043.00) which the Trustees had paid to PBGC as a termination insurance premium on or about December 1, 1974. A true copy of said letter dated July 8, 1975, is attached hereto as Exhibit "I" and by reference incorporated herein.

26. By letter dated July 30, 1975, PBGC refused to refund the aforesaid termination insurance premium paid by the Trustees on the ground that the Plan is a defined

benefit plan within the meaning of the Act. A true copy of said letter dated July 30, 1975, is attached hereto as Exhibit "J" and by reference incorporated herein.

27. An actual controversy has arisen and exists between the Trustees and the PBGC with respect to whether the Plan is a defined contribution plan or a defined benefit plan covered by the plan termination insurance provisions of the Act.

DATED: December 5, 1975 /s/ Wayne Jett
WAYNE JETT
Attorney for Plaintiffs

DATED: Nov. 17, 1975 /s/ Henry Rose
HENRY ROSE
General Counsel

/s/ George B. Driesen
GEORGE B. DRIESEN
Deputy General Counsel

/s/ Barbara S. Gutmann
BARBARA S. GUTMANN
Staff Attorney

Attorneys for Defendant

[Exhibits A-J omitted; *see* Record on Appeal.]

ORDER GRANTING SUMMARY JUDGMENT

[Filed February 12, 1976]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Defendant.

The Operating Engineers Pension Trust is a joint labor-management trust created in conformance with §320(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 (29 USC §186(c)(5)). It was created in 1960 by a written agreement to which several contractors associations and home builders associations were signatories as employers and the international union of operating engineers, local union No. 12, as the organization representing the employees. The individual plaintiffs are trustees of the trust who have the power to administer the Pension Fund and to administer and maintain the Pension Plan which is the subject of the trust. The purpose of the trust is to create a pension fund

to which a number of employers make contributions and from which employees may draw benefits when they reach a stated age of retirement.

Congress has concerned itself over the years with the problem of employee pension funds which have terminated with financial shortages resulting in an inability of many employees to receive expected benefits upon retirement. A recent Congressional effort to bring about a cure for this problem has resulted in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, this act seeks to protect the well-being and security of the millions of employees and their dependents who are affected by benefit plans. It seeks to set safeguards for the operation of plans and to establish standards for the administration of pensions in order to minimize terminations of plans and losses to beneficiaries. Section 4002 of the Act establishes within the Department of Labor a corporate body to be known as the Pension Benefit Guaranty Corporation and its purpose is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants. Section 4005 of the Act establishes four revolving funds which are intended to serve as insurance against the failure of the particular types of pension funds which this part of ERISA is designed to cover. The corporation is empowered to prescribe insurance premium rates which it assesses against certain employers to guarantee that the pension funds created by those employers will not suffer short-fall. In the event of a termination of a pension plan of this type, the employer could be held liable for shortages in the fund up to 30% of the net worth of the employer's business. 29 USC 1362(a) and (b). Not all types of pension plans are intended to be covered under the insurance provisions of ERISA. Section 4021(b) of the Act provides as follows:

> "(b) This section does not apply to any plan — (1) which is an individual account plan, as defined in paragraph (34) of Section 1002 of this title."

Paragraph (34) of Section 3 of the Act provides as follows:

> "The term 'individual account plan' or 'defined contribution plan' menas a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, any any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

"For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Plaintiff trustees administer a pension fund for the benefit of employees within the building industry. Defendant Pension Benefit Guaranty Corporation has taken the position that the type of pension administered by plaintiff trustees is covered by the insurance provisions of ERISA and the corporation compelled plaintiff trustees to pay a premium of $12,043 into its guaranty fund. The plaintiffs contend that their pension fund comes within the exceptions set forth in paragraph (34) of Section 3 of the Act and that they are not covered by the insurance provisions. If plaintiffs' fund is not included within the exceptions just noted, the trustees would also be limited by provisions of ERISA as to the manner in which they could administer the fund over which they are trustees. Additionally, employers who contribute to plaintiffs' fund

would be subject to the liability provisions of ERISA in the event of a termination of the plan.

In short, plaintiff contends that its plan is an "individual account plan" or "defined contribution plan" as referred to in 29 USC § 1002(34) while the defendant corporation contends that plaintiffs' plan is a "defined benefit plan" as defined in Section 1002(35) and is therefore covered. Plaintiffs' trustees communicated their objections to the defendant corporation upon being required to pay premiums into the corporation's Guaranty Fund, but defendants legal staff concluded that the Operating Engineers Pension Trust is a Defined Benefit Plan for the purposes of Section 4021(b)(1) because plaintiffs' method of computing a participant's pension benefit appeared to be formula based on service and therefore within the class of plans called defined benefit plans rather than an individual account plan. In this litigation, which seeks to have this Court determine whether plaintiffs' plan comes within the exceptions of Section 4021(b), the defendant urges that since it is the agency charged with enforcing ERISA, its determination of coverage should be given more weight than that reached by plaintiff trustees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

AGREEMENT ESTABLISHING THE OPERATING ENGINEER'S PENSION TRUST

The 1960 agreement which established the trust administered by plaintiffs (hereinafter called the "Trust Agreement") provided that each collective bargaining agreement between the union and the employers would bind the employers to abide by the Trust Agreement and to pay a stated amount into the trust with respect to each hour worked by each employee covered by the collective bargaining agreement. Article II, Section 7 of the Trust Agreement provides as follows:

"Neither the Employers nor any Signatory Association or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

Article VII, Section 4 of the Plan provides as follows:

"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits

established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

Article VIII, Section 2 of the Plan provides:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support his benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

FORMULA FOR FIXING PENSION AMOUNT

The monthly amount of the pension payable to a participant who is eligible for a pension in plaintiffs' plan is determined by multiplying the numbers of his respective Prior Service Credits and Pension Credits accumulated by the appropriate Pension Factor. The Plan provides for some participants to be entitled to Prior Service Credits. It also provides for certain participants to receive Pension Credits pursuant to a prescribed formula. The Pension Factor used to determine the benefit entitlement of participants is fixed from time to time. In setting the Pension Factor, the trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies.

EMPLOYER CONTRIBUTIONS

Under the Pension Trust created by its signatories in 1960 the various employers would enter into collective bargaining agreements from time to time with the union. As a part of the terms of that agreement the employer obligated himself to make certain contributions into the trust fund for each of his employees, measured by the number of hours worked and any Prior Service Credits or Pension Credits to which the employee would be entitled. The amount the employer is obligated to contribute to the fund may change from time to time. This comes about because the trustees of the Plan are authorized annually to have prepared an actuarial evaluation of the fund which shall consider the actuarial status of the fund and this is taken into account in determining which amendments or modifications shall be made to the Pension Plan. If it appears from the actuarial report that the fund is in peril, the trustees have the power at a given period to compel

such additional contributions into the fund from the employers as should preserve the integrity of the fund.

By its terms as quoted hereinbefore, the Plan assures the employer that his sole obligation to the fund is to pay such contributions for each employee as from time to time the plaintiff trustees shall determine is appropriate. The agreement states in clear and concise language not subject to any ambiguity that the employers obligation to the employee for pension benefits is ended when he pays the appropriate contribution into the fund. In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather it is clear that he only promises that he will pay into the fund each pay period the contribution that is prescribed by the trustees and that his obligation to the fund is then ended.

In negotiating a collective bargaining agreement there is the possibility that a union could make a demand upon an employer to extend to the employee a defined pension benefit, but such has not been done in the contract under review. In the negotiations that attended this agreement the employer demanded that his obligation be ended once he made a contribution to the individual account of the employee and the union accepted the provision. To interpret this carefully constructed agreement as not coming within the exceptions of Section 1002(34) is to force upon the employer a greater obligation and liability than he had agreed to in his contract.

Defendant argues strenuously that plaintiffs' plan is covered by the insurance provisions of ERISA because it is not a true "individual account plan" as defined by Section 1002(34). That section defines an individual account plan as a plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, and any

forfeitures of accounts of other participants which may be allocated to such participant's account. Defendant states that because the contributions of the employer to the individual's account is not maintained precisely like the concept of one's savings account in a bank, but instead the money is pooled by the trustees for investment purposes, and because of the computerized method employed by the trustees in reckoning the accumulated amounts contributed to the individual's account from time to time, this destroys proper characterization of the plan as an "individual account plan" or "defined contribution plan." The legislation which must guide the consideration of this dispute is lengthy and complex and represents draftsmanship that is confusing, to say the least, but a fair reading of the Act and the legislative history which preceded the enactment leads me to conclude that the structure of plaintiffs' plan properly comes within the exceptions of Section 1002 and should be characterized as an individual account plan.

Defendant claims that plaintiffs' plan does not come within Section 1002(34) because an "individual account plan" is one which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to each participant's account. Defendant argues that in the instant plan, benefits are not based solely upon the amount contributed to each participant's account because a part of the retirement benefit is based on past service. The parties stipulate that a participant is entitled to a pension benefit which is determined by multiplying his "Prior Service Credits" by the current "Pension Factor." An employee earns one Prior Service Credit (up to 20) for each year of covered service in the industry prior to the establishment of the plan by the 1960 agreement.

Moreover, defendant argues, the plan provides for a monthly benefit determined by multiplying each "Pension Credit" by the appropriate "Pension Factor." A "Pension Credit" is earned whenever a participant works a given number of hours. The retirement benefits payable to a participant are based directly upon the number of hours worked by the employee and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits.

Moreover, PBGC argues that there is another reason for concluding plaintiffs' plan to be a covered plan. Section 4021(c)(1) of the Act, 29 USC § 1321(c)(1) provides as follows:

> "For purposes of subsection (b)(1) of this section, the term "individual account plan" does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Defendant argues that employer representatives participated in the determination of the benefit in plaintiffs' plan.

As I see it, the employer is signatory to an agreement which sets up a joint labor-management trust which has a Board of Trustees. The Trust binds the employer to pay a stated amount to the Trust for each employee covered by the collective bargaining agreement. The trustees are the ones who make a determination of the benefits, and this scheme includes no such participation on the part of the employer as is intended in Section 4021(c)(1) of the Act.

I conclude that plaintiffs' plan is a defined contribution plan under which no fixed benefit is promised; that it comes within the exception stated in 29 USC § 1321(b)(1) and that plaintiffs are entitled to summary judgment. The Court further finds that defendant should

be required to return to plaintiff the sum of $12,043 plus interest thereon from the date said sum was paid to defendant and that defendant, its agents, employees and representatives are enjoined from acting in any manner inconsistent with the judgment of this Court as set forth in this memorandum which, pursuant to Rule 52(a) FRCP shall take the place of findings of fact and conclusions of law.

DATED: This 12th day of February, 1976.

/s/ David W. Williams,
DAVID W. WILLIAMS,
United States District
Judge

SUMMARY JUDGMENT FOR PLAINTIFFS JOHN L. CONNOLLY, ET AL.

[Filed February 18, 1976.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.,
Plaintiffs,
vs.
PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant.

The motion of plaintiffs John L. Connolly, et al., for summary judgment having come on regularly for hearing on 1976, in the above-entitled Court, the Honorable David W. Williams, Judge, presiding, plaintiffs having appeared through their attorney of record, Wayne Jett, and defendant having appeared through its attorneys of record, Henry Rose, General Counsel, George B. Driesen, Deputy General Counsel, and Barbara Gutmann, Staff Attorney, and the Court having considered all the pleadings and the stipulations which have been filed, and the oral arguments of counsel, and having considered the law and having found that there is no genuine issue of fact to be submitted for trial and having concluded that plaintiffs are entitled to judgment as a matter of law, and the Court having made and caused to be filed its written findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment in favor of plaintiffs and against defendant be, and it hereby is, granted, and that plaintiffs recover from defendant the total sum of $12,043.00 paid by plaintiffs to defendant on or about December 1, 1974, together with interest thereon at the

rate of seven percent (7%) per annum from said date until paid. In addition thereto, plaintiffs shall recover such additional amounts as may be shown to have been paid by plaintiffs to defendant subsequent to the filing of plaintiffs' motion for summary judgment herein, together with its reasonable attorneys' fees and cost of suit incurred herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Pension Plan of the Operating Engineers Pension Trust is a defined contribution plan within the meaning of 29 U.S.C. § 1002(34) which does not promise a fixed benefit within the meaning of 29 U.S.C. § 1321(c)(1) and which is not a plan covered by the plan termination insurance provisions of the Employee Retirement Income Security Act of 1974 [29 U.S.C. §§ 1301-1381].

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a permanent injunction be, and it hereby is, granted to restrain defendant, its agents, employees, representatives and all persons in concert with them from acting in any manner inconsistent with the judgment of this Court to interfere with the rights of plaintiffs, their agents, employees, representatives and successors, as found, concluded and declared by this Court.

DATED: Feb. 18, 1976

/s/ David W. Williams

DAVID W. WILLIAMS,
United States District
Judge

ORDER RE THREE-JUDGE COURT

[Filed Sept. 13, 1979.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

Plaintiffs, trustees of the Operating Engineers Pension Trust, move for convocation of a three-judge court to hear its constitutional claim that regulations of the Pension Benefit Guaranty Corporation infringe upon their right to contact and deprive them of property without due process. The case, filed in 1975, predates Public Law 94-381, 90 Stat. 1119, which amended the provisions for a prejudge court. However, Section 7 of that enactment specifically makes that Act not applicable to actions commenced before the enactment. The case is before this court on remand from the Court of Appeals, which had reversed this court's ruling based upon its construction of the statute. This court had agreed with the Trustees that their pension plan was excluded from the scope of the regulations complained of which plaintiffs complain.

Trustees assert that because they must make certain additional payments under ERISA beyond their contractual provision, that their right to contract has been infringed, and that there is a due process violation. This court considers the question, and has determined that as a matter of law there is no substantial constitutional question raised warranting the convening of a three-judge

court. The Court of Appeals made clear in its order of reversal and remand that the pension plan at issue fell under the provisions of ERISA. As a qualified pension plan under ERISA, the plan is a beneficiary of the tax benefits provided by the law, as well as being required to conform to the complained-of regulations issued by the agency entrusted with administration of provisions of ERISA. The Supreme Court has made clear that in claims of infringement of the constitutional right to contract and of a deprivation of property without due process, a party must accept the responsibilities imposed by a governmental scheme as part of its distribution of benefits, absent other due process violations. *Fahey v. Mallonee*, 332 U.S. 245 (1947). There is no allegation that the regulations about which plaintiffs complain were adopted in a manner contrary to due process or other rule-making requirements.

This Court may decline to certify the need to convene a three-judge court when the constitutional question presented is insubstantial. I therefore decline to do so.

IT IS SO ORDERED.

DATED: This 13th day of September, 1979.

/s/ David W. Williams

DAVID W. WILLIAMS,
United States District
Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Mar. 24, 1981.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

The motion of defendant Pension Benefit Guaranty Corporation for summary judgment having come before the Court, the Honorable David W. Williams presiding, and the cause having been submitted for a decision, and an Order having been made granting defendant's motion for summary judgment and directing that judgment be entered for defendant Pension Benefit Guaranty Corporation, the Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs John L. Connolly, et al., are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust and bring this action in their official capacities as such. A true and correct copy of the Agreement Establishing the Operating Engineers Pension Trust (hereinafter the "Trust Agreement") is attached as Exhibit A to the Stipulation re Motion for Summary Judgment filed in this action by agreement of the parties.

2. Defendant Pension Benefit Guaranty Corporation is a non-profit, wholly federally owned, government corporation established by Section 4002 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1302.

3. A true and correct copy of the Pension Plan established pursuant to the Trust Agreement (hereinafter "Plan") is attached as Exhibit B to the Stipulation re Motion for Summary Judgment filed in this action by agreement of the parties.

4. In the Stipulation re Motion for Summary Judgment, the parties have agreed as follows:

At all relevant times, the Plan has been and is a plan:

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to a collective-bargaining agreement between employee representatives and more than one employer,

(C) under which the amount of contribution made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year, by all employers making such contributions, and

(D) under which benefits are payable to each participant without regard to the cessation of contributions by the employer who had employed that participant except to the extent that such benefits accrued as a result of service with the employer before such employer was required to contribute to such a plan.

CONCLUSIONS OF LAW

1. The Plan is a multiemployer employee pension benefit plan within the meaning of 29 U.S.C. Sections 1002(2) and 1301(3).

2. Plaintiff's Complaint does not raise any substantial constitutional question.

DATED: This 24th day of March, 1981.

/s/ DAVID W. WILLIAMS

DAVID W. WILLIAMS,
United States District Judge

ORDER GRANTING SUMMARY JUDGMENT

[Filed Mar. 24, 1981.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

Upon consideration of the Motion for Summary Judgment of the Pension Benefit Guaranty Corporation, it is,

ORDERED: That the Motion of the Pension Benefit Guaranty Corporation for Summary Judgment is granted and judgment is hereby entered in favor of the Pension Benefit Guaranty Corporation and against plaintiffs in their capacities as Trustees of the Operating Engineers Pension Trust.

DATED: This 24th day of March, 1981.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District
Judge

NOTIFICATION AND REQUEST FOR DESIGNATION OF THREE JUDGE COURT

28 U.S.C. § 2284

[Filed Jun. 21, 1982.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, et al., etc.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant.

TO: *The Honorable James R. Browning, Chief Judge, United States Court of Appeals for the Ninth Circuit.*

Pursuant to the provisions of 28 U.S.C. Section 2284, you are notified that the complaint now pending in the above cause involves, among other things, the enforcement, operation and execution of federal statutes and seeks an injunction restraining the enforcement and execution of those statutes.

This Notification and Request for Designation of Three Judge Court is made and issued pursuant to the Mandate of the United States Court of Appeals for the Ninth Circuit in this case, officially reported at 673 F.2d 1110.

IT IS ORDERED that the original of this Notification and Request be filed and that the Clerk forward true copies thereof by United States mail to Chief Judge James R. Browning and to all counsel who have appeared in this proceeding.

Dated: June 21, 1982

/s/ David W. Williams
DAVID W. WILLIAMS
United States
District Judge

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTION
[29 U.S.C § 1303(f)]
[28 U.S.C. § 2201-2202]
[F.R.C.P. Rule 57]

[Filed Aug. 16, 1982]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America.

Defendant.

FIRST CLAIM FOR RELIEF

1. The jurisdiction of this Court is invoked under Section 4003(f) of the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. § 1303(f)] and under the Declaratory Judgment Act [28 U.S.C. §§ 2201-2202].

2. Plaintiffs JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J.

BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON (herein called the "Trustees") are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust (herein called the "Trust"), and bring this action in their official capacities as such.

3. The Trust is a joint labor-management trust created and existing in conformance with Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 [29 U.S.C. § 186(c)(5)]. The principal office of the Trust is located in the County of Los Angeles, State of California.

4. Defendant Pension Benefit Guaranty Corporation (herein called the "Corporation") is a non-profit corporation established within the Department of Labor of the United States of America by Section 4002 of ERISA [29 U.S.C. § 1302].

5. The Trustees administer a pension plan (herein called the "Plan") established pursuant to the Trust. A written Agreement Establishing the Operating Engineers Pension Trust (herein called the "Trust Agreement") was executed in 1960 by certain employers (herein called the "Employers") and the International Union of Operating Engineers, Local Union No. 12, (herein called the "Union"). At all times the Trust Agreement has contained a provision in Article II, Section 7, thereof as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employer or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with

> respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

The collective bargaining agreement between the Union and the Employers at all times has bound the Employers to abide by the Trust Agreement and to pay a stated amount to the Trust with respect to each hour worked by (or paid) each employee covered by the agreement.

6. At all times the Plan has contained a provision in Article VII, Section 4 thereof, as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any

liability directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

7. At all times the Plan has contained a provision in Article VIII, Section 2, thereof as follows:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall

take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

8. The Corporation has no authority over any pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account (herein called a "defined contribution plan"), unless the defined contribution plan promises a fixed benefit and the employer or his representative participated in the determination of that benefit.

9. The Plan is a defined contribution plan under which no fixed benefit is promised.

10. The Trustees heretofore applied to the Corporation for a determination that the Plan is a defined contribution plan and that the Corporation has no authority over the Plan. A true copy of the Trustees' written request for determination submitted to the Corporation is attached hereto as Exhibit "A" and by reference incorporated herein.

11. The Corporation has unlawfully and arbitrarily refused to determine the Plan to be a defined contribution plan, and has unlawfully and arbitrarily determined the Plan to be a defined benefit plan over which the Corporation exercises substantial control. A true copy of the written determination by the Corporation is attached hereto as Exhibit "B" and by reference incorporated herein.

12. The exercise of authority by the Corporation over the Plan has damaged the Trustees, and threatens further damage to the Trustees throughout the indefinite future, as follows:

(a) The Trustees have been required to pay and have paid to the Corporation the sum of $12,043.00 as a termination insurance premium in order to avoid assessment of a late payment charge not exceeding one hundred percent (100%) of said amount, plus interest, and the Corporation threatens to require additional payments each in a similar or greater amount annually throughout the indefinite future.

(b) The Corporation has impaired the discretion and authority of the Trustees to administer the Plan in accordance with the Trust Agreement and the Plan by purporting to regulate, control and approve or disapprove modificatons of the Plan by the Trustees.

(c) The Corporation's exercise of authority over the Plan violates and invalidates the express terms of the Trust Agreement and the Plan, which define the limit of the Employers' liability as the payments required by the collective bargaining agreements between the Employers and the Union, and substitutes therefor the unknown future cost of providing benefits described in the Plan. The Corporation requires the reporting of any amendment of the Plan which may decrease the benefit payable to any participant of the Plan, and the Corporation purports to hold the authority to approve or disapprove any such amendment of the Plan. Pursuant to the Corporation's action, any amendment to the Plan which may increase the benefit payable to any participant of the Plan would correspondingly increase the liability of the Employers. Any such increase in liability of the Employers will cause bargaining between the Employers and the Union on the subject of the amendment to the Plan, and thereby deprives the Trustees of the discretion and control of the Plan necessary to

perform their duties as fiduciaries to administer the Plan in the interest of the participants and in accordance with the terms of the Trust Agreement and the Plan.

(d) The Corporation imposes on the Employers and all other contributing employers of the Plan the risk of liability to the Corporation in an amount as much as thirty percent (30%) of the net worth of each employer. Further, the Corporation purports to have the authority to require the Employers and all other contributing employers of the Plan to pay to the Corporation substantial sums in amounts presently unknown as premiums to insure against the above-described risk.

13. The Corporation contends that such damages are caused by the Trustees and such additional risk and liability are imposed upon the Employers and all other contributing employers of the Plan through the enactment of federal statutory law creating and empowering the Corporation and modifying the rights and obligations of the Employers, the Union, the Trustees and the participants under the pre-existing collective bargaining agreements, Trust Agreement and Plan. The Trustees contend that such contentions by the Corporation are arbitrary and contrary to the express terms of the statutory enactment; further, that the Corporation's contentions directly contravene the express terms of the collective bargaining agreements, the Trust Agreement and the Plan and giving legal effect to such contentions will impair the valuable consensual contract rights of the Employers, the Union, the Trustees and the participants; and, further, that the Corporation's actions and contentions hereinabove described seek and threaten to deprive the Employers, the Union, the Trustees and the participants of their just and

lawful property without the due process of law and without just and adequate compensation.

14. The damages to the Trustees caused by the Corporation are continuing and irreparable. The Trustees have no complete remedy at law.

15. By reason of the foregoing, an actual controversy has arisen and exists between the Trustees and the Corporation with respect to whether the Corporation has erroneously applied the law to the facts to determine that the Plan is a defined benefit plan subject to the authority of the Corporation.

SECOND CLAIM FOR RELIEF

16. The allegations of paragraphs 1, 2, 3, 4, 5, 6, 7 and 14 are incorporated to the same effect as if set forth at length.

17. The terms and provisions of the Trust Agreement and the collective bargaining agreement, as modified and amended from time to time, were negotiated through good faith collective bargaining between the Union and the Employers. The Union has been at all times, and is, the lawful representative of all participants in the Plan for purposes of collective bargaining with the Employers.

18. The collective bargaining agreement reached by the Union and the Employers has obligated each Individual Employer to pay a certain fixed amount to the Trust for each hour of employment of each employee covered by the agreement. The Employers did not promise to provide a fixed pension benefit to any employee represented by the Union.

19. The Employers and each Individual Employer relied upon the collective bargaining agreement made with the Union as establishing the full amount of compensation

due from the Individual Employer for the employment duties performed by employees represented by the Union. The Union relied upon the agreement of the Employers that each Individual Employer would pay to the Trust certain fixed amounts of money, which could thereafter be administered by the Trustees solely for the benefit of employees represented by the Union and participating in the Trust.

20. The provisions of the collective bargaining agreement, Trust Agreement and Plan together established contractual terms by which the Individual Employers were obligated to pay fixed amounts to the Trust, and the Trustees were authorized to administer and invest the monies received and to design the Plan with estimated pension benefits based on actuarial advice. At all times the Trustees retained authority under the Trust Agreement and the Plan to revise and adjust the benefit levels according to the actuarial experience of the Plan. By this arrangement and design, all investment income, expense, gains and losses were intended to, and did, accrue to the sole benefit of the participants and beneficiaries of the Plan.

21. The Union has agreed to the terms of the collective bargaining agreement and the Trust Agreement to obtain advantages and benefits for employees represented by the Union, including the following:

(a) To induce employers voluntarily to agree to the terms of the collective bargaining agreement;

(b) To induce employers voluntarily to agree to participate in the Trust;

(c) To induce employers voluntarily to agree to pay the highest possible total fixed compensation for its covered employees;

(d) To induce employers voluntarily to agree to permit the Union and its membership to determine unilaterally the amount of total compensation to be allocated to the Trust rather than to wages payable directly to the employees;

(e) To assure that all investment income and gains accrue solely to the benefit of Plan participants and beneficiaries, rather than to the Individual Employers as occurs when an employer promises to pay only the contributions actuarially required to provide a certain fixed pension benefit to the employees;

(f) To establish the Trustees as independent fiduciaries by omitting any authority for the Trustees to incur liabilities or to make promises on behalf of the Individual Employers or the Union, in order that the Trustees could perform their duties without undue interference by employers desiring to control their actions, and in order to preserve the Union's right to insist in collective bargaining upon participation in the existing Trust by all employers.

22. On September 26, 1980, ERISA was amended by enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("Amendments Act") [Pub. L. 96-364]. Section 4201 of ERISA, as amended [29 U.S.C. § 1381], provides that an employer who withdraws from participation in a multiemployer pension plan is liable to the plan in an amount to be determined in accordance with the Amendments Act. Section 4202 of ERISA, as amended [29 U.S.C. § 1382], provides that the plan sponsor of the multiemployer pension plan shall determine the amount of the employer's withdrawal liability, notify the employer of the amount, and collect the withdrawal liability from the employer.

23. The Trust and the Plan are a multiemployer pension plan as defined by Section 4001(a)(3) of ERISA, as amended [29 U.S.C. § 1301(a)(3)]. The Trustees are the plan sponsor of the Trust and the Plan as defined by Section 4001(a)(10) of ERISA, as amended [29 U.S.C. § 1301(a)(10)].

24. Section 4402(e)(2)(A) of ERISA, as amended [29 U.S.C. § 1461(e)(2)(A)] provides that the Part 1 of Subtitle E of Title IV of ERISA [29 U.S.C. §§ 1381-1405] relating to withdrawal liability takes effect on April 29, 1980.

25. Section 4006(a)(3)(A)(ii) of ERISA, as amended [29 U.S.C. § 1306(a)(3)(A)(ii)] requires the Trust to pay to PBGC premiums each year in amounts to be determined by multiplying the number of participants in the Plan by certain rates set forth in the statute.

26. The Trustees have acted pursuant to the requirements of ERISA, as amended, to identify employers who have withdrawn from the Plan, have determined the amount of withdrawal liability applicable to each such employer, and have notified each such employer of the amount of withdrawal liability due and have demanded payment of such amounts. The amount of withdrawal liability demanded in accordance with ERISA, as amended, is substantial in relation to the amount of assets and net worth of each respective withdrawn employer.

27. The provisions of ERISA, as amended, relating to withdrawal liability take the property of each withdrawn employer for the private use and benefit of the Trust and its participants and beneficiaries, in violation of the Fifth Amendment to the Constitution of the United States.

28. The provisions of ERISA, as amended, relating to withdrawal liability do not provide just and adequate

compensation to the withdrawn employer for property taken as withdrawal liability, in violation of the Fifth Amendment to the Constitution of the United States.

29. The provisions of ERISA, as amended, relating to withdrawal liability take the property of the withdrawn employer without the due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

30. The provisions of ERISA, as amended, requiring payment of premiums by the Trust to PBGC take the property of the Trust without the due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs pray for damages, declaratory judgment and injunctive relief as follows:

ON THE FIRST CLAIM FOR RELIEF:

1. Damages in the sum of $12,043.00, plus interest from the date said sum was paid to defendant, plus such additional sums, if any, which proof may show were paid to defendant by plaintiffs prior to judgment herein, and interest thereon;

2. A declaratory judgment that the Plan is a defined contribution plan which does not promise a fixed benefit and which is not subject to the coverage or authority of defendant;

3. A declaratory judgment that Sections 4006 and 4007 of ERISA, as enacted in 1974 [29 U.S.C. §§ 1306, 1307, 88 Stat. 1010-1013], requiring payments of amounts as premiums by plaintiffs to defendant violate the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that private property will not be taken without the due process of law, and that

private property will not be taken for private use, and that private property will not be taken for public use without just and adequate compensation and, accordingly, are null and void; and,

4. A permanent injunction restraining defendant, its agents, employees, representatives and all persons in concert with them from enforcing the statute or otherwise acting in any manner inconsistent with the judgment of this Court herein to interfere with the rights of plaintiffs, their agents, employees, representatives and successors.

ON THE SECOND CLAIM FOR RELIEF:

1. A declaratory judgment that Part 1 of Subtitle E of Title IV of ERISA, as amended [29 U.S.C. §§ 1381-1405], violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that private property will not be taken for private use, and that private property will not be taken for public use without just and adequate compensation and, accordingly is null and void;

2. A declaratory judgment that Part 1 of Subtitle E of Title IV of ERISA, as amended [29 U.S.C. §§ 1381-1405], violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that property will not be taken without the due process of law and, accordingly, is null and void:

3. A declaratory judgment that Section 4006(a)(3)(A)(ii) of ERISA, as amended [29 U.S.C. § 1306(a)(3)(A)(ii)], violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that property will not be taken without the due process of law and, accordingly, is null and void; and,

4. A permanent injunction restraining defendant, its agents, employees, representatives and all persons in concert with them from enforcing the statute or otherwise acting in any manner inconsistent with the judgment of this Court herein to interfere with the rights of plaintiffs, their agents, employees, representatives and successors.

Dated: August 16, 1982.

JETT, CLIFFORD & LAQUER

By /s/ WAYNE JETT
WAYNE JETT
Counsel for Plaintiffs

ANSWER OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO FIRST AMENDED COMPLAINT

[Filed Nov. 15, 1982.]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW

JOHN L. CONNOLLY, et al.,
Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

First Defense

The Amended Complaint of John L. Connolly, C. V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H. Seymour, Richard L. Corbit, Harold Edwards, Donald E. Mier, William C. Waggoner, Richard Gannon, and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, fails to state a claim against defendant Pension Benefit Guaranty Corporation (the "PBGC") on which relief can be granted.

Second Defense

For its answer to the specific allegations of the plaintiff's complaint the PBGC states:

FIRST CLAIM FOR RELIEF

1. As applied to those claims initiated through the Amended Complaint that relate to employer withdrawal liability under Sections 4201-4225 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1381-1405, the PBGC denies that this court has jurisdiction over the instant action pursuant to Section 4003(f) of ERISA, 29 U.S.C. § 1303(f). The PBGC admits that plaintiffs seek a declaratory judgment by this action.

2-15. The PBGC restates and incorporates herein its answers to the allegations in paragraphs 2-15 of plaintiffs' original COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTION, which plaintiffs filed in this court on June 17, 1975.

SECOND CLAIM FOR RELIEF

16. The PBGC restates and incorporates herein its answers as given above to the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, and 14.

17. The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in paragraph 17 of the Amended Complaint, and consequently it denies each of those allegations.

18. On information and belief, the PBGC admits the allegation incorporated in the first sentence of paragraph 18 of the Complaint. The PBGC denies any suggestion in that sentence that the collective bargaining agreement is the exclusive source of such obligation.

The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in the second sentence of

paragraph 18 of the Amended Complaint, and consequently it denies each of those allegations.

19. The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in paragraph 19 of the Amended Complaint, and consequently it denies each of those allegations.

20. The PBGC admits that the provisions of the collective bargaining agreement, Trust Agreement and Plan together established contractual terms by which the Individual Employers were obligated to make payments to the Trust, but denies that those instruments were the exclusive sources of such obligation.

The PBGC admits that the Trustees were authorized to administer and invest the monies received by the Trust but denies that the stated instruments were the exclusive sources of such authority. The PBGC denies that the stated instruments invested the Trustees with the authority to design the Plan with estimated pension benefits based on actuarial advice. The PBGC denies that the stated instruments invested the Trustees with unlimited authority to revise and adjust benefit levels according to the actuarial experience of the Plan.

The PBGC denies that by this arrangement and design, all investment income, expense, gains and losses were intended to and did accrue to the sole benefit of the participants and beneficiaries of the Plan.

21. The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in paragraph 21 of the Amended Complaint, and consequently it denies each of those allegations.

22. The PBGC admits the existence of the statutory sections cited by plaintiffs in paragraph 22 of the

Amended Complaint, but relies on those sections to speak for themselves rather than on plaintiffs' characterizations of them.

23. On information and belief, the PBGC admits the allegations contained in paragraph 23 of the Amended Complaint.

24. The PBGC admits the existence of the statutory sections cited by plaintiffs in paragraph 24 of the Amended Complaint, but relies on those sections to speak for themselves rather than on plaintiffs' characterizations of them.

25. The PBGC admits that Section 4006(a)(3)(A)(ii) of ERISA, 29 U.S.C. § 1306(a)(3)(A)(ii), requires the Trust to pay premiums to the PBGC. With respect to the remaining allegations of paragraph 25 of the Amended Complaint, the PBGC admits the existence of the cited statutory provision but relies on that provision to speak for itself rather than on plaintiffs' characterization of it.

26. The PBGC admits, on information and belief, that the Trustees have acted to identify employers who have withdrawn from the Plan. The PBGC admits, on information and belief, that the Trustees have determined the amount of withdrawal liability applicable to such employers. The PBGC admits, on information and belief, that the Trustees have notified such employers of the amounts of withdrawal liability due and demanded payment of such amounts. The PBGC is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 26 of the Amended Complaint, and consequently it denies each of those allegations.

27. The PBGC denies the allegation in paragraph 27 of the Amended Complaint.

28. The PBGC denies the allegation in paragraph 28 of the Amended Complaint.

29. The PBGC denies the allegation in paragraph 29 of the Amended Complaint.

30. The PBGC denies the allegation in paragraph 30 of the Amended Complaint.

Third Defense

The plaintiffs lack standing to seek the relief sought in paragraphs 1 and 2 of the Second Claim for Relief.

Fourth Defense

The issues raised by the amendments to the plaintiffs' original complaint are not required to be heard before a three-judge panel.

Fifth Defense

With respect to paragraphs 1, 2 and 4 of the Second Claim for Relief, the action against the PBGC is proscribed by law. Consequently, the court lacks subject matter jurisdiction over it.

Sixth Defense

With respect to paragraph 3 of the Second Claim for Relief, the plaintiffs' asserted case is not ripe for adjudication. Consequently, the court lacks subject matter jurisdiction over it.

Seventh Defense

The Amended Complaint fails to join one or more indispensable parties.

/s/ Henry Rose/PHG
HENRY ROSE,
General Counsel

Local Counsel:

/s/ Baruch A. Fellner/PHG
BARUCH A. FELLNER
Associate General Counsel

PETER OSINOFF
Assistant U.S. Attorney
U.S. ATTORNEY'S OFFICE
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

/s/ Peter H. Gould
PETER H. GOULD
Attorney

PENSION BENEFIT
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(202) 254-3010

ORDER GRANTING INTERVENTION

[Filed Dec. 14, 1982.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,

Defendant.

WOODWARD SAND CO., INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,

Proposed Intervenors.

Plaintiffs, trustees of a pension plan established pursuant to a collective bargaining agreement [Plan], are attacking the constitutionality of the Multi-Employer Pension Plan Amendments Act of 1980 [MPPAA], 29 U.S.C. §§ 1306, 1307 and 1381-1405. The MPPAA requires the Plan to pay termination insurance premiums to defendant Pension Benefit Guaranty Corporation [PBGC] which would cover the Plan if it is terminated without enough assets to pay out vested employee benefits. The MPPAA also states that employers who withdraw from any pension plan will incur withdrawal liability based upon their share of the plan's unfunded vested benefits. Plaintiffs claim that the MPPAA violates the Fifth Amendment because it constitutes a taking without just

compensation and interferes with the bargained-for organization of the Plan which limits an employer's liability to his own contributions.

The applicants seeking intervention [Applicants] are 4 former employer members of the Plan who are subject to sizeable withdrawal liabilities under the MPPAA. Applicants have all filed suits against the PBGC and the plaintiff trustees in United States District Court in the Southern District of California in San Diego seeking, among other things, to have the MPPAA declared unconstitutional as applied to them. [1] They now move to intervene as party plaintiffs in this action. Applicants assert that they may intervene as a matter of right under Fed.R.Civ.P. 24(a)(2) or, alternatively, that the court should grant them permissive intervention under Fed.R.Civ.P. 24(b)(2). Defendant PBGC opposes the intervention. Plaintiff trustees do not oppose the motion so long as the Applicants are limited to litigating issues within the scope of plaintiffs' First Amended Complaint.

The court denies Applicants' motion for intervention as of right, but grants their motion for permissive intervention.

Intervention as a Matter of Right

Under Rule 24(a)(2), a party may intervene in an action as a matter of right if he has

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[1]The names of these cases are as follows: *Woodward Sand Co., Inc. v. Operating Engineers Pension Trust*, Case No. 81-920-N(I); *Roy L. Klema Engineers, Inc. v. Operating Engineers Pension Trust, Pension Guaranty Corp.*, Case No. 82-370-N(1); *Municipal Engineers, Inc. v. Operating Engineers Pension Trust, Pension Benefit Guaranty Corp.*, Case No. 82-372-N(H); and *Penfield & Smith Engineers, Inc. v. Operating Engineers Pension Trust, Pension Benefit Guaranty Corp.*, Case No. 82-371-N(I).

> an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

Plaintiffs' First Amended Complaint is a broad attack on the facial constitutionality of the MPPAA and does not address any specific application of the legislation. Specifically, ¶¶ 27-29 of the complaint allege that the MPPAA "take[s] the property of each withdrawn employer for the private use and benefit of the [Plan] . . . in violation of the Fifth Amendment," without "just and adequate compensation," and "without the due process of law." The relief sought by the complaint is merely a declaratory judgment that the MPPAA is unconstitutional and therefore "null and void." Thus, Applicants' "interest" in this action under Rule 24(a)(2) is no greater than any other employer subject to withdrawal liability under the MPPAA.

What makes Applicants' position unique, however, is that their San Diego lawsuits could be impaired by the *stare decisis* effect of the instant action. In particular, Applicants are concerned that this case, being before a 3 Judge Court, will be appealed directly to the Supreme Court well before their San Diego cases. Applicants point to the language of Rule 24(a)(2) and argue that an adverse Supreme Court ruling in this case would "as a practical matter impair [their] ability to protect [their] interests."

The circuits are divided on the question of whether the possible *stare decisis* effect of a case requires intervention as a matter of right. The 5th Circuit only grants intervention if the applicant has a direct interest in the identical property which is the subject of the action. *Atlantis Development Corp. v. United States*, 379 F.2d 818, 829 (5th

Cir. 1967). The 2d and 10th Circuits are more willing to accept *stare decisis* as the basis for intervention as a right without such an identity of interest. *Compare NY PIRG v. Regents,* 516 F.2d 350, 353 (2d Cir. 1975) *with National Resources Defense Council v. NRC,* 578 F.2d 1341, 1345 (10th Cir. 1978).

In *Blake v. Pallan,* 554 F.2d 947 (9th Cir. 1977), the California Commission of Corporations attempted to intervene in an action by the SEC against certain securities brokers. One argument the California Commission made was that the *stare decisis* effect of the federal case would impair its ability to prosecute the defendants under state law. In ruling against intervention, the 9th Circuit attempted to measure the actual effect that an acquittal of the defendants would have on the applicant. The court noted that there was no identity of property interests as existed in *Atlantis Development Corp., supra,* and also observed that the applicant was not limited to the federal courts in protecting its interests. Finally, the court remarked that there would be no *stare decisis* effect at all if the federal case did not reach judgment before the state prosecution.

Following the *Blake* approach, we also note that, unlike *Atlantis Development Corp., supra,* this is not a case determining specific property interests in such a way as to foreclose any further claims to the property. Moreover, there are other cases challenging the MPPAA's constitutionality which could reach the Supreme Court before this case. Two of these cases are scheduled for oral argument before the 9th Circuit this month. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California,* Appeal No. 82-5460 and *G & R Roofing Co. v. Carpenters Pension Trust for Southern California,* Appeal nos. 82-5461 and 82-5462.

Even assuming that the instant case will be reviewed by the Supreme Court before any others, a ruling by the Court that the MPPAA is constitutional on its face, *i.e.*, rationally designed to protect employees' vested pension benefits by imposing reasonable retroactive liabilities on employers, *See Nachman Corp. v. PBGC*, 592 F.2d 947, 958-61 (7th Cir. 1979), would not eliminate Applicant's claims that the MPPAA is unconstitutional as applied to them. Finally, if Applicants are granted intervention as a matter of right there is no reason why every other plaintiff challenging the MPPAA would not have an equal right to intervene in this action.

For these reasons, this court is not prepared to grant Applicants intervention under Fed.R.Civ.P. 24(a)(2).

Permissive Intervention

Rule 24(b)(2) allows the trial court, in its discretion, to grant permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common," unless the intervention would cause undue prejudice or delay. The constitutionality of the MPPAA is such a common question of law. The court does not believe that the intervention will result in undue delay because Applicants have stated that they contemplate no further discovery and the PBGC is already familiar with Applicants' claims from the San Diego litigation.

Finally, Applicants' presence in this action will advance judicial economy and aid in the progress of the trial. Applicants have agreed to stay their San Diego cases if they are permitted to intervene in this case. Furthermore, as Applicants have a more direct financial stake in the outcome of this litigation, (it is they who will have to pay

the withdrawal charges, not plaintiff trustees), their presence will help clarify the issues and make the case more concrete.

Applicants' motion for Intervention as a matter of right under Rule 24(a)(2) is DENIED. Applicants' motion to permissively intervene under Rule 24(b)(2) is GRANTED on the condition that they do not litigate beyond the scope of plaintiffs' First Amended Complaint.

IT IS SO ORDERED.

DATED: This 14 day of December, 1982.

David W. Williams

DAVID W. WILLIAMS,
Senior United States
District Judge

COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF

[Filed Feb. 10, 1983.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 75 2037 DWW

JOHN L. CONNOLLY, ET AL., ETC.,

Plaintiffs,

PENSION BENEFIT GUARANTY CORPORATION, ETC.,

Defendant.

WOODWARD SAND CO., INC; PENFIELD & SMITH, INC: KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.

Plaintiffs in Intervention

Plaintiff in Intervention (hereinafter "Intervenors") complain against Defendant, Pension Benefit Guaranty Corporation and allege as follows:

PARTIES

1. Intervenors, Woodward Sand Co., Inc., Penfield & Smith, Inc., Klema Engineering, Inc., and Municipal Engineers, Inc., are California corporations engaged in civil engineering and surveying and/or building material supply busines in Southern California. Intervenors are all employers that formerly contributed to the Operating Engineers Pension Trust ("Pension Trust"), the Trustees of which are plaintiffs in this action.

2. Between August and September, 1980, the collective bargaining agreement (with Local 12, International Union of Operating Engineers) of each Intervenor expired. From that time on, each Intervenor ceased to have an obligation to contribute to the Pension Trust, and ceased to be represented, if ever they were, directly or indirectly, by any of the Trustees on matters concerning the Pension Trust.

3. The Trustees are now asserting claims in their first amended complaint which are purportedly on behalf of employers such as Intervenors who have withdrawn from the Pension Trust. As alleged in paragraphs 22 and 26 of the first amended complaint, the Trustees have demanded substantial payments from employers that withdraw from the Pension Trust (including Intervenors), pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, et seq.

4. Intervention is necessary here for Intervenors to protect their legal interests, since they have no adequate remedy at law. The entire focus of the Second Claim for Relief of the first amended complaint is on the harm MPPAA imposes on employers *who have withdrawn* from the Pension Trust, yet no current party to this lawsuit represents any employer in this position. Only by allowing this intervention will the Court have before it directly harmed employers withdrawn from the Trust.

5. The Trustees not only assert claims on behalf of withdrawn employers that they do not represent, but have taken a position here directly contrary to the one they have been required to take in cases pending against the Pension Trust brought by Intervenors in the Southern District of California.

6. Vigorous advocacy of the claims held by withdrawn employers contained in the first amended complaint can be insured only by allowing these withdrawn employers to intervene.

7. Intervenors have a legitimate and necessary interest in being allowed to intervene in this case.

8. Participation by Intervenors in this case will not inject new legal issues into the proceedings, unduly complicate the proceedings with additional factual inquiries, or delay the proceedings in any material respect.

9. Defendant Pension Benefit Guaranty Corporation ("PBGC") is, upon information and belief, a non-profit corporation established within the United States Department of Labor, organized and existing under the laws of the United States (29 U.S.C. § 1302), with its principal place of business in Washington, D.C. The PBGC is the United States governmental agency responsible for enforcing Title IV of ERISA, as amended by MPPAA.

10. Intervenors incorporate by this reference and allege every allegation contained in paragraphs 2, 3, 5, 6, 7, 13, 18, 19, 22, 23, 24, 26, 27, 28, and 29 of Plaintiff Trustees' first amended complaint as though set forth here in full.

11. The issues sought to be litigated by Intervenors are virtually identical to those alleged by the Trustees in the second cause of action of their first amended complaint.

JURISDICTION AND VENUE

12. This action arises under the Constitution of the United States, including without limitation the Fifth Amendment; under ERISA, 29 U.S.C. § 1001 et seq., as

amended by MPPAA; pursuant to 28 U.S.C. § 1331, and under 18 U.S.C. §§ 2001-2202.

13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (e).

FIRST CLAIM FOR RELIEF

14. Intervenors incorporate by this reference and allege every allegation contained in paragraphs 1 through 10 of this complaint in intervention, inclusive, as though set forth in full herein.

15. Each Intervenor has received from the Plaintiff Trustees a claim for various sums, based upon the withdrawal liability provisions of MPPAA.

16. In accordance with the terms of MPPAA, an arbitration proceeding involving Woodward Sand Company has been conducted and become final (29 U.S.C. § 1401(b)) to determine the reasonableness of the Trustees' actuarial assumption regarding the rate of return on investment. The reasonable rate was determined to be 7.9 percent, and application of the result of the arbitration to each of the Intervenors herein would reduce their withdrawal liability approximately 24 percent.

17. MPPAA was enacted on September 26, 1980, a date *after* each Intervenor had ceased to have an obligation to contribute to the Pension Trust of the Trustees. MPPAA purports to create a new liability which Trustees have asserted against each Intervenor based upon cessation of the obligations of the Intervenors to contribute to the Pension Trust. In the case of each Intervenor, as alleged in paragraph 26 of the Trustees' first amended complaint, the amount claimed by the Trustees, even as reduced by application of the arbitration result, is substantial in relation to the amount of assets and net worth of each respective Intervenor.

18. Intervenors seek a declaration that they are not liable to the Trustees or the PBGC under MPPAA because, as alleged in paragraph 27 of the Trustees' first amended complaint, the statute (on its face and as applied to each Intervenor) takes the property of Intervenors for the private use and benefit of the Trustees and its participants and beneficiaries, in violation of the Fifth Amendment to the Constitution of the United States.

19. Intervenors seek a declaration that they are not liable for withdrawal liability under MPPAA because, as alleged in paragraph 28 of the Trustees' first amended complaint, the statute (on its face and as applied to each Intervenor) does not provide just and adequate compensation to the withdrawn employer for property taken as withdrawal liability, in violation of the Fifth Amendment to the Constitution of the United States.

20. Intervenors seek a declaration that they are not liable for withdrawal liability under MPPAA because, as alleged in paragraph 29 of the Trustees' first amended complaint, the statute (on its face and as applied to each Intervenor) takes the property of the withdrawn employer without the due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

WHEREFORE, Intervenors pray that this Court:

A. Enter a declaratory judgment that:

A.1. Part 1 of Subtitle E of Title IV of ERISA, as amended (29 U.S.C. §§ 1381-1405), violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that private property will not be taken for public use without adequate and just compensation and,

A.2. Part 1 of Subtitle E of Title IV of ERISA, as amended (29 U.S.C. §§ 1381-1405), violates the provisions of the Fifth Amendment to the Constitution

of the United States which guarantee that property will not be taken without the due process of law and, accordingly, is unconstitutional and void;

B. Grant a permanent injunction restraining defendant PBGC from requiring Plaintiff Trustees, their agents, employees, representatives and all persons in concert with either of them from enforcing the statute or otherwise acting in any manner inconsistent with the judgment of the Court herein.

C. Grant Intervenors such other and further relief as the Court deems appropriate.

Respectfully submitted,

LUCE, FORWARD, HAMILTON & SCRIPPS

BY: RICHARD M. FREEMAN,
Attorneys for Intervenors

NOTICE OF MOTION AND MOTION OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO STRIKE DECLARATIONS AND EXHIBITS FILED BY PLAINTIFFS AND INTERVENORS

[Filed Jun. 28, 1983.]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW RJK DWN

JOHN L. CONNOLLY, *et al.*, etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs in Intervention

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PLEASE TAKE NOTICE that the undersigned will bring the following motion for hearing before the United

States District Court, Central District of California, Federal Court Building, 312 North Spring Street, Los Angeles, California 90012, on July 6, 1983 at 9:00 a.m.

Defendant Pension Benefit Guaranty Corporation (the "PBGC") respectfully moves this court to strike the Declarations and Exhibits filed by Plaintiffs and Intervenors in support of their motions for summary judgment. As more fully set forth in the accompanying memorandum, this motion is based on the following:

1. The Declarations and Exhibits constitute an attempt to expand the record in this case beyond the scope of this litigation as set forth in the First Amended Complaint and this court's order allowing intervention.

2. Denial of the motion to strike would necessitate discovery to test new and untried factual material, and thus would jeopardize the prompt resolution of the facial constitutional challenge presented in this case.

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ANSWER OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF

[Filed July 12, 1983.]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW RJK DWN

JOHN L. CONNOLLY, *et al.*, etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs-in-Intervention

First Defense

The Complaint in Intervention (the "Complaint") of Woodward Sand Co., Inc.; Penfield & Smith, Inc.; Klema Engineering, Inc.; and Municipal Engineers, Inc. ("Intervenors") fails to state a claim against defendant Pension Benefit Guaranty Corporation (the "PBGC") on which relief can be granted.

Second Defense

For its answer to the specific allegations of the Complaint the PBGC states:

1. On information and belief, the PBGC admits the allegations of paragraph 1 of the Complaint.

2. The PBGC is without knowledge or information sufficient to permit it to form a belief as to the truth of any of the allegations contained in paragraph 2 of the Complaint.

3. The PBGC admits the existence of the paragraphs of the Trustees' First Amended Complaint and of the statutory provisions cited in paragraph 3 of the Complaint, but relies on those paragraphs and provisions to speak for themselves rather than on intervenors' characterizations thereof.

4. The PBGC denies the allegations of the first sentence of paragraph 4 of the Complaint. The PBGC admits the existence of the Second Claim for Relief of the First Amended Complaint, but relies on it to speak for itself rather than on intervenors' characterization thereof. The PBGC admits that prior to the court's grant of intervention, no party in this lawsuit represented any employer that had withdrawn from the Operating Engineers Pension Trust ("the Pension Trust"). The PBGC is without knowledge or information sufficient to form a belief as to whether those withdrawals have actually taken place and therefore the PBGC denies that intervenors have withdrawn from the Pension Trust.

5. Paragraph 5 of the Complaint states conclusions of law which it is not necessary to admit or deny.

6. The PBGC denies the allegations of paragraph 6 of the Complaint.

7. The PBGC denies the allegations of paragraph 7 of the Complaint.

8. The PBGC denies the allegations of paragraph 8 of the Complaint.

9. The PBGC admits the allegations of paragraph 9 of the Complaint.

10. The PBGC restates and incorporates herein its answers to the allegations in paragraphs 2, 3, 5, 6, 7, 13, 18, 19, 22, 23, 24, 26, 27, 28 and 29 of the plaintiffs' First Amended Complaint.

11. The PBGC denies the allegations of paragraph 11 of the Complaint.

12. The PBGC admits that this action arises under ERISA. The PBGC denies the remaining allegations of paragraph 12 of the Complaint.

13. The PBGC denies the allegations of paragraph 13 of the Complaint.

14. The PBGC restates and incorporates here its answers to the allegations in paragraphs 1 through 10 of the Complaint.

15. On information and belief, the PBGC admits the allegations of paragraph 15 of the Complaint.

16. On information and belief, the PBGC admits that an arbitration proceeding involving Woodward Sand Company has been conducted to determine the reasonableness of the Trustees' actuarial assumption regarding the Trust's rate of return or investment. The PBGC admits that such proceeding determined a rate to be 7.9 per cent. The PBGC denies the remaining allegations of paragraph 16 of the Complaint.

17. The PBGC admits that the Multiemployer Act was enacted on September 26, 1980 and that it imposes withdrawal liability on certain private parties. The PBGC denies the remaining allegations of paragraph 17 of the Complaint.

18, 19, 20. Paragraphs 18, 19, and 20 of the Complaint are statements of intervenors' purpose in this action to which no response is necessary.

Furthermore, the PBGC denies any allegation not specifically admitted.

Third Defense

The issues raised in the Complaint are not required to be heard before a three-judge panel.

Fourth Defense

The intervenors' action against the PBGC is proscribed by law. Consequently, the court lacks subject matter jurisdiction over it.

Fifth Defense

The intervenors have not exhausted their statutorily-mandated administrative remedies. Consequently, the court lacks subject matter jurisdiction over this action.

Respectively submitted,

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Associate General Counsel

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ORDER DENYING MOTION TO STRIKE — ORDER DENYING MOTION FOR A PROTECTIVE ORDER

[Filed July 25, 1983.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW-RJK-DWN

JOHN L. CONNOLLY, et al.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs-in-Intervention.

Defendant Pension Benefit Guaranty Corporation [PBGC] has moved to strike all exhibits attached to plaintiff Trustees' motion for summary judgment and Intervenors' motion for summary judgment. The PBGC objects to the Trustees' exhibits because they demonstrate the effects of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1302 *et seq.* [MPPAA], "as applied" to the Trustees and therefore expand the scope of this litigation. Specifically, PBGC states that the exhibits (a) describe the collective bargaining arrangements between the Union and the employers, (b) allege the operation of Trust, and (c) state the impact of the MPPAA on the collective bargaining and the Trust's operations.

Despite the PBGC's protestations, all of these issues were raised in the original complaint and the first amended complaint. Paragraphs 17-21 of the first

amended complaint make allegations regarding the collective bargaining efforts of the Union and the employers. Paragraphs 5-8 describe the operation of the Trust, and paragraphs 22-26 allege how the MPPAA has disrupted Trust operations.

Furthermore, even though Trustees attack the "facial" constitutionality of the MPPAA, they must still demonstrate that they have been "injured-in-fact" in order to satisfy Article III "Case and Controversy" standing. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981); *Warth v. Seldin*, 422 U.S. 490 (1975). Thus, plaintiffs' declarations and exhibits are relevant and do not expand the issues of this litigation beyond the complaint. Defendant's motion to strike plaintiff's exhibits is DENIED.

The PBGC objects to the Intervenors' exhibits because they describe the facts underlying specific assessments of Intervenor's withdrawal liability and the effects of this liability on Intervenors' financial viability. As stated above, Intervenors must make some showing that they are injured by the MPPAA to satisfy Article III standing. Thus, the exhibits are relevant for this limited purpose.

Moreover, Intervenors' summary judgment motion remains an attack on the "facial" constitutionality of the MPPAA and the exhibits' unnecessary detail regarding Intervenors' particular problems does not transform the motion into an "as applied" challenge. To the extent that Intervenors' exhibits may contain irrelevant statements, they will not be considered by this court in ruling on the motion for summary judgment. Defendant's motion to strike Intervenor's exhibits is DENIED.

II

The Trustees have moved for a protective order against further discovery, arguing that the barrage of discovery initiated by the PBGC will distract their counsel from the summary judgment motion. Plaintiffs cite cases which have upheld the denial of a continuance to complete discovery before a summary judgment motion if the moving party was not diligent in pursuing discovery before the motion. *See e.g. Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193-94 (9th Cir. 1980).

If the PBGC requests such a continuance, these cases would support the denial of the request. The cases do not, however, support the issuance of a protective order against discovery already noticed.

It is true that the PBGC is requesting a great deal of marginally relevant information from the Trustees and Intervenors and it may well be that responding to this discovery would be overly burdensome. Nevertheless, some of this discovery is clearly valid and, without more guidance, the court cannot determine what discovery is oppressive under Fed.R.Civ. P. 26(c). Plaintiffs' motion for a protective order is therefore DENIED without prejudice.

IT IS SO ORDERED.

DATED: This 20 day of July, 1983.

/s/ David W. Williams

DAVID W. WILLIAMS,
Senior United States District Judge

ORDER

[Filed August 31, 1983.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW-DWN-RJK

JOHN L. CONNOLLY, *et al.*,
Plaintiffs,
vs.
PENSION BENEFIT GUARANTY CORPORATION,
Defendant,
and
WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs in Intervention.

The court has read and considered defendant PBGC's ex parte application for an order shortening time and motion for reconsideration. The court hereby advances these matters and denies both the application and the motion.

This case was scheduled for oral argument on August 15, 1983. At the request of PBGC, the court continued the argument until October 24th solely to accommodate defendant's lawyers' schedules. The court had no intention of permitting more discovery or briefing during the continuance.

Defendant's motion for a reconsideration is DENIED and the court hereby suspends all discovery until the summary judgment motion is decided.

IT IS SO ORDERED.

DATED: This 31st day of August, 1983.

DAVID W. WILLIAMS,
Senior United States
District Judge

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

Filed May 1, 1984.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

NO. CV-75-2037-DWW

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, ETC.,
Defendants.

WOODWARD SAND CO., INC.; PENFIELD & SMITH, INC: KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.
Plaintiffs in Intervention.

Before: NELSON, Circuit Judge, and WILLIAMS and KELLEHER, Senior District Judges.

Plaintiffs, as trustees, ("Trustees") of the Operating Engineers Pension Trust ("Pension Trust"), a joint labor-management employee benefit trust created pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 [29 U.S.C. § 186(c)(5)], seek summary judgment against defendant Pension Benefit Guaranty Corporation ("PBGC") to the effect that certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), violate the Constitution of the United

States. In particular, the Trustees contend that the provisions of the MPPAA imposing "withdrawal liability" on employers who ceased participation in the Pension Trust violate the fifth amendment of the Constitution by requiring private property to be transferred from one party to a second party for the second party's private use and benefit. In addition, the Trustees contend that the provisions of ERISA, as originally enacted and amended, requiring payments of "premiums" by the Pension Trust to PBGC, failed to accord the due process of law guaranteed by the fifth amendment.

Actions seeking to enjoin the operation of acts of Congress were, until 1976, required to be heard by district courts with three judges on the panel. Since this lawsuit was begun in 1975, it is properly before this three-judge court. *Connelly v. Pension Benefit Guaranty Corp.*, 673 F.2d 1110, 1113-14 n.1 (9th Cir. 1982).

There are no factual issues in dispute in this case. The date of intervenors' withdrawal from the pension plan is not relevant because intervenors do not challenge the retroactive application of the MPPAA. Such a challenge was rejected in *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), *prob. juris. noted sub nom PBGC v. R. A. Gray & Co.*, 52 U.S.L.W. 3308 (Oct. 18, 1983) (hereinafter "*Shelter Framing*"). Moreover, this lawsuit challenges the facial constitutionality of Title IV and the MPPAA and does not challenge the statute as applied to particular persons. Hence, allegations regarding the particularized impact of the challenged legislation on the parties' individual situations are of little relevance. We find that no triable issues of fact exist and, for the reasons set forth below, grant defendant's motion for summary judgment.

BACKGROUND

In 1974, Congress attempted to regulate pension plans in a comprehensive manner.[1] To do so, it enacted the Employee Retirement Income Security Act. Title IV of ERISA was adopted to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds. To achieve this goal, it established a system of termination insurance. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 951 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980). This termination insurance program is run by the PBGC. The PBGC is a governmental entity which receives no direct federal appropriations. Instead, it relies primarily on premium payments from private parties to insure against the failure of pension funds.

Upon enactment of ERISA in 1974, the PBGC immediately insured the receipt of all "non-forfeitable benefits" that had been earned by employees in single employer plans. A single employer who wished to terminate his plan was thus first required to notify the PBGC. 29 U.S.C. § 1341(a) (1976). If an investigation subsequently revealed that the plan lacked sufficient assets to pay its "non-forfeitable benefits," the PBGC itself became obligated for the shortfall. *Id.* at § 1341(c), (b).

Multiemployer plan benefits, in contrast, were not insured unconditionally upon enactment, but rather were guaranteed solely at the discretion of the PBGC until January 1, 1978. At that time, the guaranties were to become mandatory. *Id.* at 1381(c)(1). In the interim, the PBGC was authorized to determine on a case-by-case

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[1]Our discussion of the legislative history of the MPPAA is adopted from the discussion set forth in *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. December 19, 1983) (hereinafter *"Peick"*).

basis whether it would pay a terminating plan's beneficiaries the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* at § 1381(c)(2).

There were several reasons why Congress chose not to insure all multiemployer plan benefits immediately in 1974. Congress viewed multiemployer plans as more stable and secure than single employer plans and thus saw less need to insure the former. *See Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734 (9th Cir. 1978); 126 Cong. Rec. 12,179 (1980) (remarks of Rep. Biaggi). Moreover, Congress was concerned about the potential costs of such a program. Recognizing that it needed more time to study the entire problem, Congress delayed the effective date of the mandatory guarantee program and extended the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (1977). At the same time, Congress ordered the PBGC to prepare a comprehensive report analyzing the multi-employer situation.

After extensive consideration, the MPPAA was enacted, affecting a variety of major changes in ERISA. Under the MPPAA. the PBGC is required to guarantee certain benefits of covered multi-employer plans. The level of benefits guaranteed by the PBGC under the MPPAA is lower than the level guaranteed prior to the passage of the MPPAA. The premiums employers must pay the PBGC for insurance are significantly higher under MPPAA. The PBGC is also authorized to provide financial assistance to plans which cannot meet their current financial obligations. This permits a plan which is having financial difficulties to continue, and allows employers to continue making contributions to an insolvent plan without incurring liability under ERISA. Under the MPPAA, the insurable event for a plan is its insolvency,

rather than its termination. The MPPAA further provides that the plan benefits are to be funded over a shorter period of time than formerly required and requires arbitration to resolve a wide variety of disputes between trustees and employers. Plaintiffs raise a number of constitutional challenges to the provisions of Title IV and the MPPAA.

DISCUSSION

A. THE TAKINGS CLAUSE.

Plaintiffs argue that contractual provisions creating investment backed expectations constitute compensable property rights just as much as actual ownership of property. Relying primarily on the recent Ninth Circuit case of *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted*, 52 U.S.L.W. 3342 (November 1, 1983), they argue that employers would normally be required to liquidate other property, such as land, to pay withdrawal liability claims.

Midkiff, on its face, suggests that it does not control the case before us. *Midkiff* insists that if it had been reviewing "a *congressional* determination that there was a public use, not . . . a state legislative determination," it might have reached a different result. 702 F.2d at 798. State legislative pronouncements, *Midkiff* concludes, are entitled to less deference than Congressional determinations. *Id.* Since the case before us, unlike *Midkiff*, involves a congressional finding, we could merely cite this analysis and move on. We choose not to do this, however, because to do so would be to endorse the *Midkiff* logic.

The *Midkiff* analysis seems inconsistent with what little Supreme Court precedent is available. The Supreme Court has never written that state legislative determinations are entitled to less deference than congressional

determinations. To make it seem otherwise, *Midkiff* culls sentences from two unrelated cases, written 15 years apart, and stands them in juxtaposition. Thus, it offers this statement:

> when *Congress* has spoken on the subject 'Its decision is entitled to deference until it is shown to involve an impossibility'

T.V.A. v. Welch, 327 (1925) U.S. 546, 552 (1946), *quoting Old Dominion Land Co.*, 269 U.S. 55, 66 (1925), in contrast with this one:

> where a state legislative determination is involved: "[i]t is well established. that . . . the question what is a public use is a judicial one."

Cincinnati v. Vester, 281 U.S. 439, 446 (1930), and concludes that state legislative findings are accorded little deference. 702 F.2d at 798. The Supreme Court did not intend, in either of these cases, to draw a line between state and federal legislative judgments. In fact, the quotation from *Vester* is equally applicable to Congress, and that from *T.V.A.* equally applicable to the states. Thus, *Midkiff* has created a distinction that the Supreme Court has never recognized and has, in fact, implicitly rejected. *E.g., Berman v. Parker*, 348 U.S. 26, 31-32; *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680 (1896).

Moreover, common sense suggests that state legislative determinations, if they are to be treated differently than congressional determinations, should be granted more, not less, deference. The tenth amendment reserves power to the states. To at least one commentator, "it seems clear that the reserve power of the state in the area is greater than the power of the federal government when the federal government is acting within the boundaries of a

state." Conahan, *Hawaii's Land Reform Act: Is It Constitutional?* 6 Hawaii B.J. 31, 37 (1969). Thus, the distinction drawn in *Midkiff* between state and federal legislative findings seems an unlikely one.

The *Midkiff* distinction, however, is unnecessary to our holding here because we find that no "property" was involved in this case. Traditionally, it has been understood that to make a claim under the takings clause, the claimant must prove that "property," in the sense of "the group of rights inhering in the citizen's relation to [a] physical thing," has been "taken." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). There has been no "set formula" which the Supreme Court has evolved to determine when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government. . . ." Rather, the Court has examined the "taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors — such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action — that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

We find that the contractual right which insulates employers from further liability to the pension plans in which they participate is not "property" within the meaning of the takings clause. Although contractual rights may constitute property, *see Lynch v. United States*, 292 U.S. 579 (1934), they must be very explicit to do so. In both *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935), and *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), the parties sought to protect interest in real property. Here, in sharp contrast, we are asked to protect a mere contractual arrangement. The importance of this

distinction was reaffirmed by the Supreme Court in the recent case of *Security Industrial Bank v. United States*, ____ U.S. ____, 103 S. Ct. 407 (1983). Since appellants are unable to identify any interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans to which they participate, we find no property at issue in this case. We refuse to consider the contingent right to escape one's own liability, in derogation of statutory policies, as property under the takings clause. Accordingly, we find no constitutional violation. *See Peick v. Pension Benefit Guaranty Corporation*, No. 82-2081, slip op. at 53 (7th Cir. Dec. 19, 1983); *Dorn's Transportation Inc. v. I.A.M. National Pension Fund, Benefit Plan A*, No. 82-1141 (D.D.C. January 19, 1984) (hereinafter "Dorn's"); *Speckman v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469, 472-73 (E.D. Mo. 1983). Since we resolve this issue on the basis of our finding that no "property" is affected by the MPPAA, we need not reach the questions whether a taking occurred or whether such a hypothetical taking would be for a public purpose.

B. DUE PROCESS ANALYSIS.

If they do not affect property, provisions of Title IV and the MPPAA may yet be unconstitutional if they are not grounded in a rational basis. Plaintiffs argue that Title IV and the MPPAA achieve the reverse of their intended results. Specifically, Title IV and the MPPAA increase pension plan terminations and disrupt pension plans in general. Thus, plaintiffs argue, these statutes fail the rational basis test.

The burden of proof is on the challenging party to prove that Congress has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). Since the due process challenge here involves

only economic rights in general, this court merely must determine whether the statutes bear a rational relationship to their legitimate ends. *United States v. Carolene Products*, 304 U.S. 144 (1938); *Beller v. Middendorf*, 632 F.2d 788, 807-08 (9th Cir. 1980). We find that both Title IV and the MPPAA are founded in rational bases.

To assess the constitutionality of the withdrawal liability provisions of the MPPAA, we must apply the analysis first set forth by the Seventh Circuit in *Nachman Corp. v. PBGC*, 592 F.2d 947, 960-63 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980) (hereinafter *"Nachman"*). *See Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc.*, No. 83-7004 (2d Cir. Jan. 9, 1984) (hereinafter *"Textile Workers"*). Although much of the *Nachman* analysis is derived from contract clause considerations, those considerations are applied to the federal government through the due process clause. *See Shelter Framing*, 705 F.2d at 1510-11; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983). *But see Dorn*'s, slip. op. at 15. After pointing out that rationality is determined by comparing the identified problem to the nature and scope of the burden imposed to remedy it, the *Nachman* court considered four separate factors: 1) the reliance interest of the parties affected; 2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; 3) the equities of imposing the legislative burdens; and 4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. The court emphasized that these four factors were only to be used to determine whether the legislation represented a rational means to a legitimate end, but were not to be used to express judicial approval or disapproval of the balance struck by Congress. *See id.* We address each of these four factors in turn.

First, we must analyze the reliance interest of the parties affected by the statute. Intervenors insist that they have relied on a basic contractual agreement that they will not have to pay more to the pension plan than their original required contributions. In *Nachman*, the court found that the employees' reliance on receiving their vested benefits outweighed the employer's reliance on its ability to terminate its obligations without continuing liability. Concededly, *Nachman* involved a single employer plan, while the instant case involves multiemployer plans where the participants do not have specific promises from their own employers to pay their pension benefits. "It is nonetheless reasonable and fair to conclude that plan participants did expect their employers to continue making contributions necessary to support these expected benefits." *Textile Workers*, slip op. at 943. We conclude that the employers' reliance in their business dealings on their collective bargaining agreements is offset by employees' reliance in their personal affairs on obtaining vested pension benefits. The first *Nachman* factor does not weigh decidedly in favor of either party in this lawsuit.

The second *Nachman* factor is whether impairment of the private interest is affected in an area previously subjected to regulatory control. We find this factor to weigh heavily against the employers here. In *Nachman*, the court wrote that since plan terminations had previously been subject to federal regulation, an employer's expectation that it would not have to fund its plan's vested benefits could be given less weight by Congress. 592 F.2d at 962. In that case, the presence of Internal Revenue Service regulations governing plan terminations mitigated *Nachman's* claim of surprise when ERISA was enacted with termination liability provisions. *Id.* at 962, n. 33. "Just as the employer in *Nachman* was charged with constructive notice that its rights might someday be subject to congressional regulation, so too were plaintiffs

here. Notice was everywhere." *Textile Workers*, slip op. at 945; *See Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1512 (9th Cir. 1983) ("Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974."). Before the employers decided to close their operations, there had been decades of pre-MPPAA regulation of multiemployer plans under a variety of federal labor and tax laws. *See Peick*, 539 F. Supp. at 1044. "The enactment of ERISA in 1974 provided a comprehensive regulatory scheme mandating employer withdrawal liability in the single employer context." *Textile Workers*, slip op. at 945. This "afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created." *Peick*, 539 F. Supp. at 1044-45. (footnote omitted). Unlike *Shelter Framing*, we are not here addressing the effect of "legislative changes which extract a heavy fine for action taken *before* the changes win congressional approval." 705 F.2d at 1512 (emphasis added). Here, of course, the actions are taken *after* congressional approval. We find that the MPPAA's effect was not competely unexpected, and that Act operated in an area that Title IV had previously regulated. The second *Nachman* factor therefore favors the constitutionality of the MPPAA.

The third *Nachman* factor involves weighing the equities of imposing the burden of withdrawal liability on the employer. Here, intervenors insist that the MPPAA has radically changed the pension plan "ground rules" and unfairly burdens employers who withdraw from pension plans.

When drafting the MPPAA, Congress was forced to determine who should bear the burden of any shortfalls in a multiemployer plans. We cannot find it unreasonable for Congress ultimately to decide to require the withdrawing

employers to bear their share of the burden of funding, rather than to leave the remaining employers "holding the bag." *See* 126 Cong. Rec. 20,234 (1980) (remarks of Senator Matsunaga).

The MPPAA itself clearly demonstrates that Congress did not place the entire burden of underfunding on the withdrawing employers. *Textile Workers*, slip op. at 947. Congress, for instance, required employers to make higher minimum contributions than under ERISA, 29 U.S.C. § 1423 (Supp. V 1981); the PBGC's insurance premiums were increased, *id.* § 1306; funds were made available to supplement plan assets so that insolvent plans could continue to operate with reduced benefit payments and without requiring prohibitively high employer contributions, *id.* § 1431; participant's benefits were made subject to limited reductions in financially troubled plans, *id.* § 1426; and the PBGC's guarantee was reduced, *id.* § 1322(a). *See Peick*, 539 F. Supp. at 1051-52; *Textile Workers*, slip op. at 948. Our view of prospective legislation is, of course, quite different from the "disfavor of retrospective legislation" that lay at the core of *Shelter Framing*. 705 F.2d at 1512. We conclude, on balance, that the equities weigh in favor of the employees.

The final *Nachman* factor is whether the statute included provisions to limit and moderate the effect of the burdens it imposed. 592 F.2d at 962-63. The intervenors assert that the MPPAA has almost no moderating features. In a sense, they are correct. The statute does mitigate the effect of withdrawal liability to some extent by: a) limiting liability only to employers who voluntarily withdraw without a successor, 29 U.S.C. §§ 1384, 1390 & 1398, b) limiting the overall amount of withdrawal liability by a *de minimis* rule to eliminate the burden on small employers, 29 U.S.C. §§ 1389, 1405, c) permitting periodic installment payments of withdrawal liability, 29 U.S.C.

§ 1399(c), and d) allowing pension plans to fashion their own withdrawal rules, 29 U.S.C. § 1404. These provisions, however, may provide "little, if any comfort for the employers." *Shelter Framing*, 705 F.2d at 1514. Accordingly, we find the fourth *Nachman* factor to weigh against the MPPAA's constitutionality. On balance, however, the *Nachman* analysis reveals that the MPPAA is constitutional.

C. THE CONTRACT CLAUSE ISSUE.

The employers claim that the MPPAA retroactively impairs contractual relations in violation of the contract clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). They argue that, like the statute struck down in *Allied*, the MPPAA grossly distorts employers' contractual obligations to their former employees by imposing obligations substantially beyond the terms of negotiated employment contracts.

Reliance on *Allied* is misplaced. In that case, the Supreme Court struck down as violative of the contract clause a Minnesota statute imposing pension fund liability on an employer. However, "a number of critical differences exist between the Minnesota statute and the MPPAA. Most significantly, *Allied* involved a state statute, not an act of Congress. The prohibition against impairing the obligation of contracts is directed against state statutes." *Textile Workers*, slip op. at 958. We find the MPPAA to pass contract clause muster.

D. REMAINING CONSTITUTIONAL CONTENTIONS.

Plaintiffs assert that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds. The argument is that it is improper to allow the PBGC to decide whether to pay unfunded

vested benefits of plans that terminate before January 1, 1978. *See* 29 U.S.C. § 1181(c)(1) (repealed 1980). We find this issue moot since, as of July 1, 1980, the PBGC no longer has this discretionary power.

In the final pages of their Memorandum of Points and Authorities, intervenors raise several constitutional challenges to the MPPAA. They assert that the statute (a) involves a taking of property without a hearing, analogizing MPPAA withdrawal liability to a writ of garnishment, (b) fails to allow judicial participation prior to a seizing of property, (c) violates due process by giving the trustees' calculations of withdrawal liability a presumption of correctness, (d) deprives intervenors of a right to a jury trial, and (e) is unconstitutionally vague.

Intervenors were allowed to join in this litigation "on the condition that they do not litigate beyond the scope of plaintiffs' first amended complaint." *Connolly v. PBGC*, CV 75-2037 (C.D. Cal. 1982) (order granting intervention). The first amended complaint focuses on the MPPAA's disruption of existing collective bargaining relationships, and its alleged unconstitutional taking of property without compensation or rational basis. Nowhere in the complaint are there facts alleged which would support the additional procedural due process claims advanced by the intervenors. These contentions are hereby ordered stricken from the record. They are outside the confines of the first amended complaint and beyond the scope of permissive intervention.

CONCLUSION

Summary judgment is granted in favor of the defendant as to all of plaintiffs' and intervenors' facial constitutional challenges. We do not, however resolve the constitutionality of the statutes as applied to particular

parties. That issue, not raised by this lawsuit, is being litigated in another district.

SO ORDERED.

The Clerk of the Court shall serve copies of this Order, by United States Mail, upon the attorneys of record for the parties appearing in this action.

Dated: April 25, 1984

/s/ Dorothy W. Nelson
DOROTHY W. NELSON
United States Circuit Judge
Sitting by Designation

/s/ David W. Williams
DAVID W. WILLIAMS
United State District Judge

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge

JUDGMENT

[Filed Dec. 3, 1984. Entered Dec. 4, 1984.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

No. CV 75-2037-DWW-DWN-RJK

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant,

and

WOODWARD SAND COMPANY, INC.; PENFIELD AND SMITH, INC.; KLEMA ENGINEERING, INC.; AND MUNICIPAL ENGINEERS, INC.,
Plaintiffs In Intervention.

This Three-Judge Court having been duly convened to hear and determine substantial questions of constitutionality presented by this case, the motions of plaintiffs and plaintiffs-in-intervention for summary judgment came on regularly for hearing on October 24, 1983 in the above-entitled court, all parties appearing through counsel, and the court having considered all the pleadings and the stipulations on file and the oral arguments of counsel having found that there is no genuine issue of fact to be submitted for trial and having concluded that defendant is entitled to judgment as a matter of law, and the court having made and caused to be filed on May 1, 1984, its written Order Granting Summary Judgment To Defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Part I of Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. §§ 1381-1405] is hereby declared to be constitutional. Plaintiffs' assertions that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds are moot, since as of July 1, 1980, the PBGC no longer had this discretionary power.

2. §§ 4006 and 4007 of the Employee Retirement Income Security Act of 1974, as enacted in 1974 (29 U.S.C. §§ 1306, 1307, 88 Stat. 1010-1013), insofar as the terms thereof apply to multiemployer pension plans, are hereby declared to be constitutional.

3. Section 4006(a)(3)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. § 1306(a)(3)(A)(ii)] is hereby declared to be constitutional.

4. The challenges of plaintiffs-in-intervention Woodward Sand Company, Inc.; Klema Engineering, Inc.; Municipal Engineers, Inc.; and Penfield & Smith, Inc. to the constitutionality of withdrawal liability as applied to them are not before the court.

5. The challenges of plaintiffs-in-intervention to the dispute resolution procedures of ERISA are not before the court. All allegations in support of such challenges are struck from the record of these proceedings.

6. Defendant shall recover from plaintiffs its costs incurred during the pendency of this litigation and from plaintiffs-in-intervention its costs of the litigation of issues argued by plaintiffs-in-intervention.

DATED: This 30th day of November, 1984.

/s/ Dorothy W. Nelson
DOROTHY W. NELSON
United States Circuit Judge

/s/ David W. Williams
DAVID W. WILLIAMS
Senior U.S. District Judge

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
Senior U.S. District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Jan. 31, 1985.]

Three Judge Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW-DWN-RJK

JOHN L. CONNOLLY, et al.,
Plaintiffs,
vs.
PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND COMPANY, INC., et al.,
Plaintiffs-in-Intervention.

Notice is hereby given that Woodward Sand Company, Inc., plaintiff-in-intervention in the above-captioned case, for itself alone, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on December 4, 1984.

This appeal is taken pursuant to Title 28, United States Code, Sections 1253, 2101.

DATE: January 29, 1985

LUCE, FORWARD,
HAMILTON &
SCRIPPS

By:_____
ALBERT T. HARUTUNIAN III
Attorneys for
Woodward Sand
Company, Inc.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Jan. 31, 1985.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

No. CV 75-2037-DWW-RJK-DWN

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

VS.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,
Defendant.

WOODWARD SAND COMPANY, INC.; PENFIELD AND SMITH, INC.; KLEMA ENGINEERING, INC.; AND MUNICIPAL ENGINEERS, INC.,
Plaintiffs In Intervention.

Notice is hereby given that plaintiffs in the above captioned action, John L. Connolly, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, hereby appeal to the Supreme Court of the United States from the Judgment entered in this action on December 4, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

JETT, CLIFFORD & LAQUER

By: /s/ Wayne Jett
WAYNE JETT
Counsel for Plaintiffs

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Mar. 20, 1985.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

No. CV 75-2037-DWW-RJK-DWN

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,
Defendant.

WOODWARD SAND COMPANY, INC.; PENFIELD AND SMITH, INC.; KLEMA ENGINEERING, INC.; AND MUNICIPAL ENGINEERS, INC.,
Plaintiffs In Intervention.

Notice is hereby given that plaintiffs in the above captioned action, John L. Connolly, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, hereby appeal to the Supreme Court of the United States from the Judgment entered in this action on December 4, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

JETT, CLIFFORD & LAQUER

By: /s/ Wayne Jett
WAYNE JETT
Counsel for Plaintiffs

(6) (7)

Office-Supreme Court, U.S.
FILED
JUL 25 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1555 AND No. 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND COMPANY, INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION; JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,
Appellees.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF OF APPELLANT WOODWARD SAND COMPANY, INC.

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QUESTION PRESENTED

By requiring the payment of "withdrawal liability" to a multiemployer pension trust from an employer who has no further obligation to the pension trust, does the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1453 (1982), take the property of the employer for the use of the pension trust in violation of the Taking Clause of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The list of all parties to the proceeding before the Three Judge Court of the United States District Court for the Central District of California is as follows:

John L. Connolly, C.V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H. Seymour, Richard L. Corbit, Harold Edwards, Donald E. Mier, William C. Waggoner, Richard Gannon, and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, plaintiffs; Pension Benefit Guaranty Corporation, a nonprofit corporation established within the Department of Labor of the United States of America, defendant; Woodward Sand Company, Inc. ("Woodward Sand"), Penfield & Smith, Inc. ("Penfield & Smith"), Roy L. Klema Engineers, Inc. ("Klema Engineers") (improperly named as Klema Engineering, Inc.), and Municipal Engineers, Inc. ("Municipal Engineers"), plaintiffs-in-intervention.

Penfield & Smith, Klema Engineers, and Municipal Engineers are not parties to this appeal, and are designated as appellees under Supreme Court Rule 10.4, 28 U.S.C. app. at 442 (1982). Penfield & Smith, Klema Engineers, and Municipal Engineers are not joining in the appeal by Woodward Sand because the Trustees have now agreed that, as a result of a recent statutory change in the effective date of the Multiemployer Pension Plan Amendments Act of 1980, these three employers have incurred no liability under the statute.

Woodward Sand also does business as Woodward Sand and Materials Company, and as Woodward Organic Products Company.

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No. 84-1555 AND No. 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

WOODWARD SAND COMPANY, INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION; JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,

Appellees.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF OF APPELLANT WOODWARD SAND COMPANY, INC.

OPINION BELOW

The Three Judge Court of the United States District Court for the Central District of California filed its Order Granting Summary Judgment to Defendant on May 1, 1984. The Order is not officially reported, and is reproduced in the Joint Appendix ("Jt. App.") at 104.[1]

JURISDICTION

The Three Judge Court of the United States District Court for the Central District of California filed its Order Granting Summary Judgment to Defendant on May 1, 1984. Jt. App. at 104. The Order, *inter alia*, rejected Woodward Sand's contention that the Muitiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1453 (1982) ("MPPAA") effected a taking in violation of the Taking Clause of the Fifth Amendment to the United States Constitution, and denied a permanent injunction against enforcement of MPPAA. The Three Judge Court entered its judgment on the Order on December 4, 1984. Jt. App. at 119. Woodward Sand filed its Notice of Appeal on January 31, 1985, Jt. App. at 122, and its Jurisdictional Statement on April 1, 1985. This Court noted probable jurisdiction on June 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The portion of the Fifth Amendment at issue in this appeal is as follows:

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[1] Other earlier opinions below that predate Woodward Sand's involvement in this case are discussed in the Trustees' Jurisdictional Statement in Case No. 84-1555 at 2-3.

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The statutory provisions challenged by Woodward Sand are contained in the Multiemployer Pension Plan Amendments Act of 1980, which enacted Part 1, Subtitle E, Title IV of the Employee Retirement Income Security Act of 1974, 94 Stat. 1208 (codified at 29 U.S.C. §§ 1381-1453 (1982)). The essential provisions are as follows:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a).

> When an employer withdraws from a multiemployer plan, the plan's sponsor, in accordance with this part, shall--
>
> > (1) determine the amount of the employer's withdrawal liability,
> >
> > (2) notify the employer of the amount of the withdrawal liability, and
> >
> > (3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1382.

STATEMENT OF THE CASE

Woodward Sand is a California employer engaged in the building materials supply business. Until 1980, Woodward Sand was a member of a multiemployer bargaining group that negotiated and was signatory to collective bargaining agreements with the International Union of Operating Engineers, Local Union No. 12 ("Local 12"). As part of such collective bargaining agreements, Woodward Sand agreed to contribute to the Operating Engineers Pension Trust ("Pension Trust") a negotiated amount per hour worked by each employee, and to abide by the terms of the incorporated Pension Trust Agreement ("Trust Agreement") which had been executed by certain employers and Local 12 in 1960, and which provided for the creation and funding of the Pension Trust. Jt. App. at 63-64, 69-70, 90. R. at Docket No. 128, Exh. 7, p. 180.

As with all multiemployer pension trusts established after passage of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 136 (codified as amended at U.S.C. §§ 141 - 187 (1982)), the Pension Trust was established consistent with the requirements of sections 302(a) and (c) of the LMRA. Section 302(a) broadly prohibits payments by an employer "to any representative of any of his employees," but section 302(c) excepts employer contributions to a pension trust if certain conditions are met. These conditions include requirements that: (1) the pension trust be established "for the sole and exclusive benefit of the employees" and certain beneficiaries; (2) "the detailed basis on which such payments are to be made be specified in a written agreement with the employer"; and (3) "employers and employees be equally represented in the administration of such fund."[2]

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[2] A fuller text of these portions of sections 302(a) and (c) of the LMRA, 29 U.S.C. § 186(a), (c), is as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the

(Footnote 2 continued on page 5)

Although section 302(c)(5) requires that the employer contributors in a multiemployer pension trust must appoint one-half of the trustees, the section's additional requirement that the pension trust be established "for the sole and exclusive benefit of the employees" ensures that the trustees are totally independent of the employers (and union) that selected them, and are to be fiduciaries acting exclusively in the interest of the pension trust's participants and beneficiaries.[3]

(Footnote 2 continued)

> interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce . . . .
>
> . . .
>
> (c) The provisions of this section shall not be applicable . . .
>
> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund . . .; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . . .

[3] *Accord, National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 331-32 (1981).

Within the framework set up by section 302 of the LMRA, the Trust Agreement includes a number of provisions, common in multiemployer pension trusts established under the LMRA, which effectively provide as follows:

1. The Trustees have the exclusive right to set or change benefits.

2. The Trustees are not to grant benefits which cannot be adequately funded.

3. The sole source of funding of benefits is the corpus of the Pension Trust.

4. The employers' obligation to contribute to the Pension Trust is completed when the set contribution amount agreed to in the collective bargaining agreement is paid, even if the contributions are insufficient to pay the vested benefits allowed by the Trustees.[4]

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[4] Relevant provisions of the Trust Agreement, as set forth in the Pension Trust's First Amended Complaint, Jt. App. at 62, are as follows:

> Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employer or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations

(Footnote 4 continued on page 7)

In this setting, Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829 (codified as

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(Footnote 4 continued)

> of such Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements.

Art. II, Sec. 7.

> This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments.

Art. VII, Sec. 4.

> This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has

(Footnote 4 continued on page 8)

amended at 29 U.S.C. §§ 1001-1381 (1982)). Title IV of ERISA created an insurance program, administered by the Pension Benefit Guaranty Corporation ("PGGC"), intended to provide benefits to the participants in certain "defined benefit" pension trusts that terminated with insufficient assets to cover their guaranteed benefits. 29 U.S.C. § 1302.[5] The PBGC was given discretionary authority to pay benefits upon the termination of multiemployer pension trusts, 29 U.S.C. § 1381(c)(2)-(4), and employers who had contributed to a "defined benefit" multiemployer pension trust were subject only to a contingent liability. If a multiemployer pension trust terminated, and if the PBGC chose to pay the guaranteed benefits, employers who had contributed to the pension trust during the preceding five years were required to reimburse the PBGC in proportion to their contributions, but in no event more than 30% of each employer's net worth. 29 U.S.C. §§ 1362(b)(2), 1364.

Notwithstanding the fact that under the Trust Agreement and applicable collective bargaining agreements contributing employers only promised a set contribution, not a set benefit level, the PBGC ruled in 1975 that the Pension Trust was a "defined benefit plan," not a "defined contribution plan," and that the Pension Trust therefore fell under the PBGC's regulatory jurisdic-

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(Footnote 4 continued)

> assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan.

Art. VIII, Sec. 2.

[5] ERISA defines a "defined benefit plan" to be any plan that is not a defined contribution plan. 29 U.S.C. § 1002(35). ERISA defines a "defined contribution plan" as "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenes, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

tion and was liable to the PBGC for payment of insurance premiums. Jt. App. at 21. The Trustees subsequently filed this action against the PBGC on June 17, 1975, seeking in part declaratory and injunctive relief for violation by the PBGC of the Taking and Due Process Clauses of the Fifth Amendment.[6] Jt. App. at 1.

In early 1980, Woodward Sand timely sent Local 12 notice of its termination of the then current collective bargaining agreement and notice of its intention to negotiate with Local 12 separately and directly, independent of the multiemployer bargaining group. Woodward Sand and Local 12 reached impasse in the negotiations in September of 1980 (although this date is in dispute). Because section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), prohibits an employer from making, and a pension trust from accepting, further contributions once impasse is reached, Woodward Sand ceased making such contributions to the Pension Trust. Woodward Sand paid all contributions and satisfied all obligations required by the Trust Agreement for the time before impasse was declared, and it could no longer contribute to the Pension Trust.

On September 26, 1980, MPPAA took effect, radically altering the contractual underpinnings and the legal relationship between employers and pension trusts. MPPAA requires that upon an employer's "withdrawal" from a pension trust, the trustees calculate the amount of the pension trust's total unfunded vested benefits,[7] allocate a portion thereof to the "withdrawing

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[6] The extensive subsequent procedural history of this case, occurring before Woodward Sand intervened, is set forth in the Trustees' Jurisdictional Statement in Case No. 84-1555 at 7-8.

[7] Unfunded vested benefit liability is the difference between the value of the pension trust's assets and its vested benefit liability. 29 U.S.C. § 1393(c). The term "vested benefits" refers to the actuarial present cash value of (1) expected future benefits due to all plan participants currently receiving benefits plus (2) expected future nonforfeitable benefits due to all active and terminated participants who are not currently receiving benefits. 29 U.S.C. § 1002(25). The term

(Footnote 7 continued on page 10)

employer," and demand payment of that amount as "withdrawal liability." Thus, despite specific contractual provisions among contributing employers and a pension trust strictly limiting the amount of employer contributions to the amounts set forth in the collective bargaining agreement, and despite full compliance with those provisions by the employers, MPPAA requires a "withdrawing" employer to contribute substantial additional sums to the pension trust to make up for unfunded vested benefits at benefit levels set solely by the trustees.

MPPAA places no limit on the amount of withdrawal liability to be collected from an employer, and authorizes a pension trust to collect payment from an employer even if the liability exceeds the net worth of the employer.[8] In accordance with MPPAA's requirements, the Pension Trust has demanded from Woodward Sand payment of a substantial sum for withdrawal liability.

By direction of the Ninth Circuit, the district court in this case requested that a Three Judge Court be convened on June 21, 1982, to adjudicate the constitutional challenges and request for injunctive relief originally raised by the Trustees. Jt. App. at 61. Because MPPAA was enacted during the course of this action, the Trustees filed an amended complaint challenging MPPAA as well. Jt. App. at 62. Woodward Sand sought leave to intervene, which was granted by an Order filed on December 15, 1982. Jt. App. at 82. Woodward Sand subsequently filed a complaint in intervention on February 10, 1983. Jt. App. at 88.

(Footnote 7 continued)

"nonforfeitable" in this context signifies the unconditional, legally enforceable right to receive benefits provided by the pension trust. 29 U.S.C. § 1002(19). Whether a benefit is "vested" or "forfeitable" will depend on the provisions of the pension plan, or overriding provisions of ERISA, as amended.

[8] This, in fact, was the case with Klema Engineers, one of the plaintiffs-in-intervention below. The Pension Trust demanded payment of withdrawal liability in an amount representing approximately seven times Klema Engineers' net worth. R. at Docket No. 128, Exh. 4, p. 100.

The complaint in intervention seeks a declaration, *inter alia*, that MPPAA violates the Fifth Amendment by taking the property of withdrawn employers for the use and benefit of the Pension Trust without just compensation. The complaint in intervention also seeks a permanent injunction against the enforcement of MPPAA.

The Trustees and Woodward Sand filed motions for summary judgment on May 13 and 16, 1983, respectively. By order filed on May 1, 1984, the Three Judge Court denied the motions for summary judgment, holding that MPPAA was constitutional on its face and denying injunctive relief. Jt. App. at 104. Regarding the Taking Clause issue, the Three Judge Court concluded that "the contractual right which insulates employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the takings clause," and that therefore it was not necessary to decide whether a taking occurred, whether any such taking was for a private or public purpose, or whether any such taking was with just compensation. Jt. App. at 110-11.

SUMMARY OF ARGUMENT

MPPAA violates the Taking Clause of the Fifth Amendment to the United States Constitution by requiring the uncompensated appropriation of up to all of the assets of employers which have withdrawn from multiemployer pension trusts. The "private property" implicated by the statute is the assets, in whatever form, which are owned, possessed and used by these employers, and which are required by the statute to be liquidated and paid to multiemployer pension trusts upon demand. MPPAA requires this appropriation despite express contractual prohibitions against it. The bundle of rights associated with an employer's entitlement to the assets of its enterprise is precisely the sort of "property" protected by the Taking Clause from uncompensated governmental transfer or destruction. Support for this conclusion is provided

by state law definitions of "property," and by precedent of this Court.

Under MPPAA, the statutorily mandated independent trustees of multiemployer pension trusts are granted the right to define the extent of their own entitlement to employer assets despite the fact that it is they, and not the employers affected, who have exercised complete control over the investment and allocation of employer contributions, and who have independently established benefits at levels which exceed the amounts yielded by the investments they have chosen to make. There is no limit on the amount of the appropriation MPPAA authorizes to be taken from employers. These amounts are allowed to exceed the value of all of the employer's assets.

MPPAA's withdrawal provisions apply to all withdrawing employers: (1) regardless of whether the withdrawal was voluntary or involuntary; (2) regardless of whether it will result in a complete appropriation of an employer's assets; (3) regardless of whether the pension trust is in jeopardy of terminating or failing to pay its benefit levels; (4) regardless of whether the trustees have raised benefit levels for retirees (who could not have worked in reliance on the increased benefit level) as well as active employees; and (5) regardless of whether the particular level of benefits, creating the underfunding, has been promised by the trustees for several years or merely involves benefits which have been recently granted.

All that is required to trigger withdrawal liability is a permanent cessation of the obligation to contribute or permanent cessation of covered operations. An employer who desires to continue contributions to the pension trust will nevertheless be forced to withdraw if, in negotiations with the union, it is unwilling to accede to the union's other collective bargaining demands. Alternatively, an employer can completely or partially withdraw from a plan involuntarily merely because economic circumstances dictate the discontinuation or substantial reduction of the activity of the employer's business. Finally, an employer is forced to withdraw if

its employees vote to decertify the union, even though they are purportedly the persons whom the law is designed to protect.

The effect of MPPAA is the imposition of a nonconsensual servitude upon employers whose private property is permanently impressed into public service without compensation in direct contravention of Taking Clause tenets. However public its purpose or rational its basis, MPPAA cannot be exempted from the constitutional requirement that government pay for a program it desires, rather than taking from a minority, without compensation, in order to fund it.

ARGUMENT

THE ASSETS OF EMPLOYERS CONSTITUTE "PRIVATE PROPERTY" FOR PURPOSES OF THE TAKING CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The threshold issue of whether "private property," as defined for purposes of the Taking Clause, is implicated by MPPAA assumes particular significance in the instant case, where the basis for the Three Judge Court's decision upholding MPPAA against attack on Taking Clause grounds was the Court's conclusion that "no 'property' was involved." Jt. App. at 110. The Court characterized the interest in question as "a mere contractual arrangement," Jt. App. at 110, and disregarded the fact that MPPAA affects far more than contractual rights. The interests implicated by MPPAA are the interests of an employer in the tangible, identifiable assets of its enterprise, whether they be in the form of realty, personalty, trade secrets, or cash in the bank. These are precisely the sort of interests protected under the Fifth Amendment from uncompensated governmental transfer or destruction. Thus, even in the absence of contractual guarantees that no liability would be assessable upon withdrawal, MPPAA's authorization of the uncompensated transfer of all of the assets of

an employer to another entity upon demand of those in control of that entity would constitute a Taking Clause violation.[9]

This Court has long recognized that "not all economic interests are 'property rights'" for Fifth Amendment purposes.[10] The

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[9] There is considerable support, however, for the proposition that the vested, express contractual right of employers to be free from seizure of most or all of their assets constitutes "private property" for Taking Clause purposes. *E.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid"); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding coal company's unexercised contractual right to mine surface coal was "taken" by state statute, and that company was entitled to compensation); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 122-23 (1924) (holding government's expropriation of claimant's contract rights a compensable taking under the Fifth Amendment); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1922) ("[t]he contract [for purchase of large quantity of steel plate] in question was property within the meaning of the Fifth Amendment").

Circuit and district court conclusions to the contrary have without exception been premised upon dicta contained in this Court's opinion in *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982), stating that "our cases recognized, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral." *E.g., Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1406 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1276 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984); *Dorn's Transportation, Inc. v. I.A.M. National Pension Fund*, 578 F. Supp. 1222 (D.D.C. 1984); *Speckmann v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469 (E.D. Mo. 1983). The opinion in *Security Industrial Bank* does *not*, however, state that contractual rights are not "property" for Taking Clause purposes, and it seems unlikely that the Court intended, with this one-sentence pronouncement, to expressly overrule the body of precedent recognizing contractual rights as "property" under the Taking Clause.

[10] *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945) (rejecting utility corporation's claimed "property right" in the high-water level of a navigable river).

interests in question here, however, possess all of the recognized attributes of traditionally protected private property. The physical, tangible assets owned, possessed, and used by an employer in furtherance of his business operation are certainly "sufficiently bound up with the reasonable expectations of [the employer] to constitute 'property' for Fifth Amendment purposes." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978). Such assets, whether in the form of liens, trade secrets, or cash are recognized as property by state law,[11] and by opinions of this Court. *E.g., Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2874 (1984)

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[11] The significance of state law definitions of "property" has been repeatedly recognized in takings analyses. *E.g., Ruckelshaus v. Monsanto Co.*, __ U.S. __, 104 S. Ct. 2862, 2872 (1984) (noting the "basic axiom" that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) ("[n]or as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance"). In *Monsanto*, the Court expressly rejected the argument that property rights recognized as such by state law could be "pre-empted" by federal legislation: "*[i]f Congress can 'pre-empt' state property law . . . then the Taking Clause has lost all vitality.*" *Id.* at 2878 (emphasis added). The Court further noted that "a sovereign, 'by ipse dixit, may not transform private property into public property without compensation.' . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* at 2878, *quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

California statutes provide that "[t]he ownership of a thing is the right of one or more persons to *possess* and *use* it *to the exclusion of others*. In this Code, *the thing of which there may be ownership is called property*," and furthermore, "[t]here may be ownership of *all inanimate things which are capable of appropriation* or of manual delivery; . . . *of all obligations*; *of such products of labor or skill as . . . the good-will of a business, trademarks and signs*, and of rights created or granted by statute." Cal. Civ. Code §§ 654, 655 (West 1985) (emphasis added). In *Haldeman v. Haldeman*, 202 Cal. App. 2d 498, 21 Cal. Rptr. 75 (1962), the court expressly recognized that "[a] business is a type of property which is a composite of tangible and intangible properties. Its tangibles will be its fixtures, inventory of supplies and stock in trade, perhaps a building or leasehold, cash on hand, cash in bank, accounts receivable and other personal property. Its intangibles include principally its good will as a going business." *Id.* at 502.

(recognizing a Taking Clause property interest in trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160, 164 (1980) (expressly stating that, for Taking Clause purposes, "[t]he principal sum deposited in the registry of the Court plainly was private property. . . . The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property"); *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman's lien protected by Taking Clause); *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 148 (1953) ("[s]o long as a railroad is not caused by such regulations *to lose money on its over-all business*, it is hard to think that it could successfully charge that its property was being taken for public use 'without just compensation'") (emphasis added); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate lien protected); *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911) (observing, with reference to Oklahoma Act authorizing State Banking Board to levy and collect assessments of one percent of each state bank's average daily deposits for purposes of creating a depositor's guaranty fund, that "there is no denying that by this law, a portion of [the bank's] property might be taken without return")

The assets in question are assignable, can form the res of a trust, and pass to a trustee in bankruptcy. In *Monsanto*, these factors were considered significant to the holding that trade secrets constitute "property" under the Taking Clause. 104 S. Ct. at 2873. The assets may take the form of trade secrets, or may be in the form of money, as was the property in *Webb's Fabulous Pharmacies, B & O Railroad* and *Noble State Bank*, or liens, as in *Armstrong* and *Radford*. Whatever their form, these assets are property, with respect to which their owners exercise "the right to *possess, use* and *dispose* of [them]," *Monsanto*, 104 S. Ct. at 2874, *quoting United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (emphasis added), as well as the right to exclude others from their possession, use, or disposition. *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("right to exclude

others" is "one of the most essential sticks in the bundle of rights commonly characterized as property").

The fact that such interests may, under some circumstances, justifiably be infringed upon, diminished in value, or otherwise impaired by government without compensation, as in the case of taxation or restrictions imposed upon designated uses,[12] does not render them any less "property." The question of whether a taking has occurred has consistently been regarded as a wholly separate inquiry from the question of whether the interests at issue constitute "property," *e.g.*, *Monsanto*, 104 S. Ct. at 2872, and is addressed below.

MPPAA AUTHORIZES THE UNCOMPENSATED TAKING OF ALL OF THE ASSETS OF EMPLOYERS UPON DEMAND OF THE TRUSTEES OF PRIVATE PENSION FUNDS IN VIOLATION OF THE TAKING CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

More than half a century ago this Court observed that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Since that time, the Court has repeatedly recognized that "the Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[13]

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[12] *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (city Landmarks Preservation Law restricting construction above landmark site not a taking); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (safety regulation prohibiting excavations below a certain level not a taking).

[13] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980), *quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960).

MPPAA epitomizes the sort of "short cut" envisioned and condemned by Mr. Justice Holmes in *Pennsylvania Coal*. In lieu of "paying for the change" desired by requiring the federal government to insure the benefits in question or to raise the revenues required for accomplishment of MPPAA's purportedly public objectives in some other manner, Congress has imposed unreasonable and unanticipated burdens upon those employers "who had in the past been sufficiently enlightened as voluntarily to agree to [contribute to] pension plans for their employees."[14]

MPPAA's effect is the complete destruction of the bundle of rights associated with an employer's entitlement to the assets of his enterprise. MPPAA places all of these assets, in whatever form, at the disposal of pension trust trustees, yet affords no compensation to the employers affected. This system goes far beyond permissible regulation "adjusting the benefits and burdens of economic life to promote the common good," *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), by mandating the imposition of a nonconsensual servitude upon employers who are forced to shoulder a burden more appropriately borne by the public as a whole, in direct contravention of Taking Clause purposes and precepts.[15]

MPPAA eradicates an employer's fundamental contractually-guaranteed right to cease participation in a pension trust without penalty and confronts the employer with the spectre of the seizure of all of the assets of the employer's enterprise to satisfy the congressionally-created "liability" which may be assessed and

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[14] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978).

[15] Any contention that the burden in question must be allocated between withdrawing employers and employers still enrolled in a pension trust misstates the issue. The critical question is whether or not the *public* should pay what is required for achievement of MPPAA's purportedly *public* purpose, or alternatively, whether the system should be restructured to allow contributing employers to control the level of benefits promised, or to limit the discretion of plan trustees to increase benefits to situations in which there are currently sufficient assets in the pension trust to preclude underfunding.

collected regardless of whether the employer's withdrawal is voluntary or involuntary, regardless of whether the result will be the complete appropriation of all of the assets of the employer or just the transfer of a nominal sum, regardless of whether the pension trust is in jeopardy of terminating or is close to fulfilling its benefit levels, and regardless of whether the upward adjustment of the level of benefits creating the underfunding sought to be remedied occurred years earlier, or just the day before.

The characterization of MPPAA's imposition of liability in terms of "withdrawal," a word which implies that the employer is free to choose whether or not to continue contributing to a pension trust, is misleading. All that is required to trigger withdrawal liability is a permanent cessation of the obligation to contribute, or the permanent cessation of covered operations. 29 U.S.C. § 1383(a). For example, if the employees whose pension benefits MPPAA is purportedly designed to protect opt to decertify the union pursuant to the LMRA, 29 U.S.C. § 159(e)(1), the employer's "right" to continue contributions to a multiemployer pension trust will be abruptly terminated. Contributions forwarded to the pension trust will be returned, and the employer, who has no choice in the matter, will be deemed to have "withdrawn." Similarly, a "withdrawal" may occur as a consequence of the inability of an employer and union to resolve an impasse reached in the collective bargaining process regarding other issues, even if the employer desires to continue contributions to the pension trust.[16] Alternatively, an employer's partial or complete "withdrawal" may be an involuntary consequence of economic circumstances which dictate the discontinuation or substantial reduction of activity of the employer's business. 29 U.S.C. §§ 1383(a)(2); 1385(a).

Under MPPAA, the pension trust trustees are authorized to levy an assessment against the employer upon withdrawal. There is no

[16] A withdrawal does not occur merely because the union and employer have been involved in a labor dispute. 29 U.S.C. § 1398. If the impasse is not ultimately resolved, however, the LMRA expressly prohibits the pension trust from accepting further contributions. 29 U.S.C. § 186(c)(5).

limit to the amount which may be assessed,[17] which depends solely upon the extent to which the pension trust in question is underfunded. MPPAA forces withdrawing employers to make up the deficit, despite the fact that employers have had no voice in the management or allocation of pension trust assets, and have therefore been powerless to challenge the trustees' arbitrary setting of benefit levels in excess of the amounts yielded by the trustees' investment of employer contributions.[18] Thus, *the trustees are given the authority to define their own entitlement to employer assets*. The result is a forced and uncompensated contribution to a pension trust.

The underfunding of vested benefits attributable to a withdrawing employer is calculated without regard to the *time* at which benefits were promised to any of the participants in the pension trust. For example, LMRA trust agreements, such as the subject Trust Agreement, are routinely amended to increase benefit levels of participants who are *already retired* or vested under the pension trust. These benefit increases reflect *no reliance interest on the part of these former employees*, yet they can dramatically increase the amount of unfunded vested benefits of the pension trust. MPPAA imposes the liability for these benefit promises not upon the pension trust trustees, who are in complete control of funding,

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[17] Under ERISA, contributors to a multiemployer fund could in some instances be charged up to 30% of their respective net assets if they had contributed to a pension trust in the five years preceding its termination. 29 U.S.C. § 1362(b)(2), 1364. The constitutionality of MPPAA in no way depends upon the constitutionality of the above-described provision. Even if that measure were deemed to be permissible "regulation," MPPAA, with its authorization of unlimited assessments against withdrawing employers, is an unconstitutional taking of employer rights and assets in violation of the Taking Clause.

[18] "[*T*]*he duty of the management-appointed trustee* of an employee benefit fund under § 302(c)(5) *is directly antithetical to that of an agent of the appointing party*. . . . ERISA essentially codified the strict fiduciary standards that § 302(c)(5) trustee must meet . . . [and] *vest*[*ed*] *the exclusive authority and discretion to manage and control the assets of the plan in the trustees alone, and not the employer* or the union." *National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 331-32, 333 (1981) (emphasis added).

but rather upon the withdrawing employer, who has no ability under the LMRA to control the situation.[19] As a consequence, regardless of whether any employees of the employer have relied upon trustee promises of particular benefits, the employer is trapped by MPPAA into a system of nonconsensual servitude from which it cannot escape -- it cannot withdraw from the pension trust because its entire business may be expropriated; yet if it continues in the pension trust, the level of underfunding, over which the employer has no control, may continue to increase.[20]

Such uncompensated expropriation of private property for public service has been held unconstitutional in a variety of

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[19] The trustees of a multiemployer pension trust, for example, may adopt a plan amendment increasing the benefit level for retirees in order to ease the impact of inflation. Such an amendment immediately increases the vested liability of the pension trust because retirees by definition have vested benefits. To the extent that the increase in vested liability is unfunded, ERISA specifies that the unfunded vested liability (termed "unfunded past service liability" in the statute) be amortized over a period of 30 years. 29 U.S.C. § 1082(b)(2)(B)(iii). This in essence provides the trustees with a mechanism for delaying the proper funding of granted benefits, and thus allows, if not encourages, trustees to grant such benefit increases currently on the assumption that they can be paid for gradually over time.

MPPAA, however, requires that an employer pay withdrawal liability in a sum calculated on the basis of the unfunded vested liability as of a given point in time. Thus, for example, if an employer withdrew from a pension trust shortly after the trustees voted to increase substantially the benefit level of retirees (thereby substantially and immediately increasing the pension trust's unfunded vested liability), the employer's withdrawal liability would also dramatically increase--even though the trustees' calculations indicate that the increased unfunded vested liability would actually be paid off over a 30-year period.

[20] Moreover, the calculation of unfunded vested benefits of the pension trust for purposes of determining the employer's withdrawal liability can change dramatically merely because of a change in the actuarial firm used by the pension trust. Actuaries are given broad latitude in calculating the amount of unfunded vested benefits; their computations may be based upon *any* actuarial assumptions which are not, "in the aggregate, unreasonable." 29 U.S.C. § 1401(a)(3)(B). Actuaries thus are not required to calculate the most precise figure for unfunded vested benefits, and MPPAA establishes a presumption in favor of the correctness of the actuarial assumptions relied upon by a pension trust. 29 U.S.C. § 1401(a)(3).

contexts. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state use of landlord property for attachment of cable television lines a compensable taking); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (Florida's appropriation of interest earned on monies deposited with the registry of the court a compensable taking); *United States v. Pewee Coal Co.*, 301 U.S. 114 (1951) (President's seizure and operation of coal mine a compensable taking); *United States v. Causby*, 328 U.S. 256 (1946) (government's use of air space above claimant's land a compensable taking); *Youngstown Sheet & Tube v. Sawyer*, 295 U.S. 476 (1935) (executive's seizure of steel plants a compensable taking); *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871) (military's seizure and use of claimant's steamers a compensable taking); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 135 (1852) (trader forced to remain with army "to insure the success of a distant and hazardous expedition" a compensable taking).[21]

MPPAA's unrestricted authorization of the taking of *all* of an employer's assets for purposes of subsidizing or increasing benefit levels which the employer did not establish, and is powerless to influence or control, is distinguishable from situations in which certain uses of property are prohibited, substantially decreasing its value, but still leaving the owner in possession and control. Under MPPAA, there is nothing to preclude the transfer of the entire equity of an enterprise. For example, the liability asserted against Klema Engineers, a plaintiff-in-intervention in the proceeding below, totalled more than seven times the net worth of the company. R. at Docket No. 128, Exh. 4, p. 100. One court has noted

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[21] It should be noted that takings have frequently been found in contexts in which the property in question has been subject to substantial prior regulation, as in the areas of security interests, *e.g., Armstrong v. United States*, 364 U.S. 40 (1960) (taking of materialman's lien); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (taking of mortgagee rights in property held as security), and mining rights, *e.g., Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). Prior regulation cannot justify subsequent legislation which rises to the level of a taking without just compensation.

that a withdrawal liability claim, "whether valid or not, sends a signal to people in the industry that the company is out of business." *T.I.M.E. - D.C., Inc. v. Trucking Employees of New Jersey Welfare Fund, Inc.*, 560 F. Supp. 294, 304 (E.D.N.Y. 1983).

However rational its basis, or public its purpose, MPPAA unconstitutionally takes private property without compensation. The factors considered in any takings analysis -- the economic impact of the alleged regulation, the extent of its interference with distinct investment-backed expectations, and the character of the government action[22] -- uniformly support this conclusion. The impact -- the permanent transfer of all of the assets of an employer to another private entity -- indisputably "interferes" with the employer's expectation that those assets will remain in its possession, subject only to valid government taxing and regulation, and to the contractual commitments which it chooses to make. The character of the governmental action -- the statutory authorization of the uncompensated transfer of an enterprise's assets to another entity for its use upon demand of the trustees of that entity -- is likewise distinguishable from constitutionally permissible governmental restrictions on specific beneficial uses of private property.

The salutary nature of Congress' desire to secure pension benefits is not disputed. That purportedly public purpose does not, however, insulate MPPAA from the constitutional requirement that property owners whose private property is taken by the government must be compensated for the resulting loss.

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[22] *See Monsanto*, 104 S. Ct. at 2874-75 (1984), and cases cited therein.

CONCL

For the reasons stated above a
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be reversed.

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Supreme Court, U.S.
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No. 84-1555 and No. 84-1567

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, ET AL., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,
VS.
PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

CORRECTED COPY

WOODWARD SAND CO., INC.,
Appellant,
VS.
PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF OF APPELLANTS CONNOLLY, ET AL.

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QUESTIONS PRESENTED

1. By requiring payments of "withdrawal liability" to a multiemployer pension trust from an employer who has no further contractual obligation to the pension trust, does the Multiemployer Pension Plan Amendments Act of 1980 [29 U.S.C. § 1381(a), *et seq.*] "take property" within the meaning of the Taking Clause of the Fifth Amendment of the Constitution?

2. If § 1381(a) takes property from the employer, is the property taken for a "private use" in violation of the Taking Clause?

3. If § 1381(a) takes property for a public use, is the property taken without "just compensation" in violation of the Taking Clause?

4. If the provisions of § 1381(a) imposing withdrawal liability are void under the Taking Clause, are the provisions of 29 U.S.C. §§ 1306-1307 requiring payment of "premiums" by multiemployer pension trusts to PBGC invalid as inseverable from § 1381(a)?

5. Are multiemployer pension trusts excused from paying "premiums" to PBGC under Title IV of ERISA as enacted in 1974 [29 U.S.C. §§ 1307-1381(c)(2); 88 Stat. 1013-1035] because the statute violates the Separation of Powers principle of the Constitution by delegating legislative discretion to determine the use of funds collected?

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No. 84-1555 and No. 84-1567

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, ET AL., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,
VS.
PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,
VS.
PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF OF APPELLANTS CONNOLLY, ET AL.

John L. Connolly, *et al.*,[1] appellants ("the Trustees"), appeal from the Judgment of the Three Judge Court convened in the United States District Court for the

[1]All parties to the proceeding in the district court are listed in the Jurisdictional Statement filed by the Trustees (JS, p. 1, n. 1).

Central District of California entered December 4, 1984, holding that certain federal statutes are constitutional and denying a permanent injunction against enforcement of such statutes.

OPINIONS BELOW

The Order Granting Summary Judgment To Defendant filed by the Three Judge Court of the U.S. District Court for the Central District of California on May 1, 1984, appears in the Joint Appendix and is not officially reported.[2] JA 104-118. The Order Granting Summary Judgment to plaintiffs filed by the district court on February 12, 1976, is reported at 419 F.Supp. 737. JA 42-52. The opinion of the U.S. Court of Appeals for the Ninth Circuit reversing summary judgment for plaintiffs and remanding is reported at 581 F.2d 729 (1978) (see JS *App.* 30). This Court denied plaintiffs' petition for a writ of certiorari as reported at 440 U.S. 935 (1979). The Order Re Three Judge Court filed by the district court on September 13, 1979, is not officially reported. JA 55-56. The order of the Ninth Circuit summarily denying a petition for writ of mandamus filed by the Trustees seeking review of the Order Re Three Judge Court is not officially reported (see JS *App.* 27). The order of this Court similarly denying plaintiffs' petition for writ of mandamus is reported at 445 U.S. 959 (1980) (see JS *App.* 26). The opinion of the Ninth Circuit reversing and remanding to the district court with directions to convene a Three Judge Court is reported at 673 F.2d 110 (1982) (see JS *App.* 17). The Judgment entered by the Three Judge

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[2] "JA" refers to the Joint Appendix followed by page number(s). "JS" and "JS *App.*" refer to the Jurisdictional Statement filed by the Trustees, and the Appendix thereto, respectively. "R." refers to the Record on Appeal, followed by the assigned docket number and page(s) of relevant document.

Court on December 4, 1984, is set forth in the Joint Appendix. JA 119-121.

JURISDICTION

The Trustees filed this action June 17, 1975, pursuant to 29 U.S.C. § 1303(f) to recover amounts paid as "premiums" to appellee Pension Benefit Guaranty Corporation ("PBGC") and for a declaratory judgment pursuant to 28 U.S.C. § 2201 holding the pension plan ("Plan") administered by the Trustees to be a "defined contribution plan" outside the jurisdiction of PBGC. JA 1 *et seq.* Alternatively, if the foregoing relief were denied, the action sought a determination that Title IV of ERISA [29 U.S.C. §§ 1301-1381; 88 Stat. 1003-1035] was unconstitutional and a permanent injunction restraining PBGC from enforcing the statute with respect to the Plan. The constitutional issues and the availability of injunctive relief were required to be heard and determined by a district court of three judges pursuant to 28 U.S.C. § 2282.

The judgment of the Three Judge Court denying a permanent injunction against enforcement of the federal statute in this action was entered on December 4, 1984. JA 119-121. On December 17, 1984, PBGC filed a motion to alter or amend the judgment in respects which are of no import to the matters to be dealt with on this appeal. The Trustees filed a notice of appeal to this Court in the district court on January 31, 1985, within the time permitted by 28 U.S.C. § 2101(b).

This Court has jurisdiction under 28 U.S.C. § 1253 to determine this appeal from the final judgment denying a permanent injunction in a civil action required to be heard and determined by a district court of three judges.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> "[N]or shall private property be taken for public use, without just compensation."

The challenged federal statutes are contained in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") and in the amendments of ERISA enacted by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The challenged statutes in their entirety are comprised of 29 U.S.C. §§ 1381-1405, §§ 1306-1307 and § 1461(c)(2) [formerly § 1381(c)(2)]. The essential statutory provisions are as follows:

29 U.S.C. § 1381(a) [94 Stat. 1217]:

> "(a) If an employer withdraws from a multi-employer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.
>
> "(b) For purposes of subsection (a) —
>
> (1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted —
>
> (A) first, by any de minimis reduction applicable under section 1389 of this title,
>
> (B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,
>
> (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term 'complete withdrawal' means a complete withdrawal described in section 1383 of this title.

(3) The term 'partial withdrawal' means a partial withdrawal described in section 1385 of this title."

29 U.S.C. § 1382 [94 Stat. 1218]:

"When an employer withdraws from a multiemployer plan, the plan's sponsor, in accordance with this part, shall —

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer."

29 U.S.C. § 1383 [94 Stat. 1218, 1220]:

"(a) For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer —

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

"(b) (1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if —

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan —

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if —

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer —

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

* * *

"(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations."

* * *

29 U.S.C. § 1385(a) [94 Stat. 1221]:

"(a) Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year –

(1) there is a 70-percent contribution decline, or

(2) there is a partial cessation of the employer's contribution obligation."

* * *

29 U.S.C. § 1306(a)(3)(A) [94 Stat. 1264-65]:

"(3)(A) [T]he annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this subchapter is —

* * *

(ii) in the case of a multiemployer plan, for the plan year within which the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 falls, an amount for each individual who is a participant in such plan for such plan year equal to the sum of —

(I) 50 cents, multiplied by a fraction the numerator of which is the number of months in such year ending on or before such date and the denominator of which is 12, and

(II) $1.00, multiplied by a fraction equal to 1 minus the fraction determined under clause (i),

(iii) in the case of a multiemployer plan, for plan years beginning after September 26, 1980, an amount equal to —

(I) $1.40 for each participant, for the first, second, third, and fourth plan years,

(II) $1.80 for each participant, for the fifth and sixth plan years,

(III) $2.20 for each participant, for the seventh and eighth plan years, and

(IV) $2.60 for each participant for the ninth plan year, and for each succeeding plan year."

29 U.S.C. § 1307 [88 Stat. 1013; 94 Stat. 1300]:

"The plan administrator of each plan shall pay the premiums imposed by the corporation under this subchapter with respect to that plan when they are due . . ."

29 U.S.C. § 1461(c)(2) [formerly 29 U.S.C. § 1381(c)(2); 88 Stat. 1034; 94 Stat. 1267]:

"The corporation may, in its discretion, pay benefits guaranteed by this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before August 1, 1980, if —

(A) the plan was maintained during the sixty months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after July 31, 1980."

STATEMENT OF THE CASE

This case presents the question whether Congress has the power, within the scheme of a "comprehensive and reticulated statute," to require one private party to pay money to another private party, based on events outside the control of the deprived party. The statute challenged in this case attempts to use legislative power at a level significantly higher than the power of eminent domain. While eminent domain operates within the limits of the Taking Clause and must guarantee just compensation to the deprived party, the "withdrawal liability" statute makes no provision for compensation of the employers required by Congress to pay money to multiemployer pension trusts. When Congress imposes such a severe impact upon personal rights in ownership of property, the Governmental action deserves especially close scrutiny by this Court to assure that the fundamental liberties protected by the Constitution remain fully intact. Such scrutiny will disclose that Congress has gone outside the bounds of "regulation" by requiring an employer to pay money to a pension trust, when the contract relations of the private parties clearly did not create such an obligation and prior regulatory conduct had given no hint of such precipitous risk. In all fairness, the statute "takes property" and, therefore, is either invalid or must afford just compensation in compliance with the Taking Clause.

The Trustees administer the Operating Engineers Pension Plan ("Plan") according to a written Agreement Establishing the Operating Engineers Pension Trust made in 1960 pursuant to § 302(c)(5) of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 186(c)(5)]. JA 29-31. This labor-management Pension Trust receives contributions from several thousand employers under written collective bargaining agreements covering employees in the construction industry of

Southern California and Southern Nevada. R. 117, p. 2. The employers periodically enter into collective bargaining agreements with the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), by which the employers agree to abide by the Trust Agreement and to pay certain contributions to the Pension Trust each month. The amount contributed by each employer is determined by multiplying the employees' hours of employment by an hourly rate specified in the collective bargaining agreement. R. 117, p. 6. Under the express terms of the Trust Agreement (JA 30-31) and the Plan (JA 31-32), the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust. JS *App.* 19-20, 32, 33. This is true even though the contributions may be insufficient to pay the benefits described in the Plan. JS *App.* 20. The benefits described in the Plan are established by the Trustees based on an actuarial estimate of the sufficiency of Trust assets to pay the benefits, and the Trustees retain authority under the Trust Agreement to adjust the benefits in light of experience and other actuarial considerations. JA 31-33.

Because under the collective bargaining agreement, the Trust Agreement and the Plan the employer promises only a fixed contribution, not a fixed benefit, the Trustees in 1975 sought an administrative ruling by PBGC that the Plan is a "defined contribution plan" excluded from PBGC's jurisdiction by the statute. JA 9-20. PBGC ruled that the Plan is a "defined benefit plan" and claimed the right to receive payments of annual "premiums" from the Pension Trust. JA 21-23. This action by PBGC had the

effect under the statute of treating contributing employers of the Pension Trust as liable for "employer contingent liability" in amounts as much as 30% of the employer's net worth if the Plan were to terminate with insufficient assets to pay the benefits described in the Plan. JS *App.* 35.

The Trustees filed this action on June 17, 1975, seeking recovery of the "premiums" paid to PBGC and a determination that the Plan was a "defined contribution plan" under the statute. JA 1 *et seq.* Alternatively, the Trustees' complaint sought a permanent injunction against enforcement of the "contingent liability" statute on grounds that the statute takes the property of the Pension Trust and its contributing employers in violation of the Due Process Clause and the Taking Clause of the Fifth Amendment and unconstitutionally impairs the contract rights of the Trustees, the employers, Local 12 and the participants of the Plan. On February 12, 1976, the district court granted summary judgment to the Trustees on grounds that the Plan was properly to be regarded as a "defined contribution plan," particularly because the employer has promised no "fixed benefits" and to do otherwise would be "to force upon the employer a greater obligation and liability than he had agreed to in his contract." JS *App.* 49, 50 (419 F.Supp. at 740, 741). On appeal, the Ninth Circuit reversed, based upon statutory interpretation to the effect that "[t]he precise intent of [the federal statute] was to impose substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan." JS *App.* 35 (581 F.2d at 732). This Court denied the petition for certiorari filed by the Trustees. 440 U.S. 935.

On remand, the district court declined to convene a three judge court on grounds that the constitutional issues raised by the Trustees were insubstantial, citing a 1947 decision of this Court involving a challenge of the

Home Owner's Loan Act of 1933. JA 55-56. After summary denials of the Trustees' petitions for writ of mandamus in the Ninth Circuit and this Court, on appeal the Ninth Circuit reversed and remanded with directions that a three judge court be convened to determine the substantial constitutional questions raised. JS *App.* 25 (673 F.2d at 1114).

On remand from the second appeal, the district court requested that a three judge court be convened on June 21, 1982. JA 61. During the litigation to convene a three judge court, ERISA was amended by the MPPAA to change "contingent liability" to "withdrawal liability," by which an employer whose contract obligation to pay contributions to the Pension Trust had ceased would be required to pay the Pension Trust amounts calculated in accordance with the statute. The Trustees filed an amended complaint addressing the amended statute on August 16, 1982. JA 62-75. By order filed December 14, 1982, four employers whose collective bargaining agreements had been terminated and who had received notifications from the Pension Trust of withdrawal liability claims as required by the statute, were granted leave to intervene in the action.[3] JA 82-87.

The Trustees' amended complaint challenged the amended statute imposing "withdrawal liability" on grounds that the statute takes the private property of the employers for the private use of others and provides no compensation for the property taken. JA 72, 74. In addition, the amended complaint maintained the challenge of the original statutory requirement of "premium" payments to PBGC and further contended that the Taking

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[3]The intervening employers included Woodward Sand Company, Inc. ("Woodward"), appellant in the consolidated appeal.

Clause is violated by the amended "premium" requirements. JA 73-74.

The Trustees filed a motion for summary judgment on May 13, 1983, and the intervening employers filed a parallel motion for summary judgment on May 16, 1983. The Trustees contended that the statutory imposition of "withdrawal liability" on employers whose contract obligations to the Pension Trust had ceased would be a taking of private property for private use, and would be taking property without compensation, in violation of the Taking Clause of the Fifth Amendment. Further, the Trustees contended that the statutory provisions requiring payment of "premiums" by the Pension Trust to PBGC after the 1980 amendments of the statutory scheme were inseverable from "withdrawal liability" and, finally, that the statutory design for collection and expenditure of "premiums" by PBGC for coverage of plans terminated prior to the 1980 amendments violated the principle of Separation of Powers by delegating legislative authority to PBGC to determine the use of the funds.

The duly convened Three Judge Court heard oral arguments on the motions for summary judgment on October 24, 1983. On May 1, 1984, the Three Judge Court filed an Order Granting Summary Judgment To Defendant holding the statute to be constitutional and denying injunctive relief. In disposing of the Trustees' contentions that the "withdrawal liability" statute takes property from the withdrawn employer and gives the property to the Pension Trust for private use without compensation to the employer, the Three Judge Court saw no need to determine whether the statutory use of property was public or private, or whether the "taking" was compensated. Instead, the Three Judge Court concluded "that no 'property' was involved in this case" (JA 110) based on reasoning that "the contractual right which insulates

employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the Takings Clause." JA 110-111. Regarding the Due Process Clause issues, the Three Judge Court summarily concluded that the statutory provisions existing between 1974 and 1980 were rational (JA 112) and reached the same conclusion regarding the amended statute after further analysis. JA 116. Finally, the Three Judge Court declined to reach the merits of the Separation of Powers issue on grounds that the issue became moot upon amendment of the statute in 1980. JA 116-117. Judgment was entered on December 4, 1984. JA 119-121.

SUMMARY OF ARGUMENT

Whether government action has gone beyond "regulation" and effected a "taking of property" is determined by the Court through a factual inquiry into factors including the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, ____, 104 S.Ct. 2862, 2874-75 (1984). The "withdrawal liability" statute challenged in this case [29 U.S.C. §§ 1381(a) *et seq.*] takes property by requiring a transfer of wealth from one private party to another.

The statute cannot be a "regulation" of existing collective bargaining agreements because the "taking" is triggered by failure to reach a *future* agreement with a union, an event outside the control of the employer whose property is taken. Similarly, the statute cannot be a "regulation" of pension plan administration because pre-existing federal law places such affairs in the hands of independent fiduciaries outside the control of the employer. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 101 S.Ct. 2789 (1981).

The Three Judge Court below unfairly characterized the statute as merely abrogating a contract right "to escape one's own liability." Such a sophistic analysis would permit Congress to avoid entirely the limitations of the Taking Clause by imposing *statutorily* a new "contract" obligation, and simultaneously abrogating contractual defenses to it. Contracts furnish no better foundation for such legislative "taking" than many other commercial and social relationships, and every legislative act must be limited by the Taking Clause. Fair characterization of the statute is crucial in preserving Taking Clause protection: the "withdrawal liability" statute takes money from an employer and transfers it to a pension trust.

The statute causes the deprived party actually to part with his property, rather than merely suffer continued use of the property under regulatory limits. The amounts of money taken by the statute are generally very substantial, and may actually exceed the net worth of the employer as a going concern. The economic impact of the statute is much more severe than has been true in previous decisions of this Court granting Taking Clause protection to deprived parties.

The most basic expectation of collective bargaining parties during the past fifty years has been shaped by the *fundamental theme* of national labor policy: The employer and the union must bargain in good faith toward a final agreement without government interference in setting the terms and, if agreement is reached, each party's obligation will be judicially enforceable according to their mutual intent. *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 282-84, 92 S.Ct. 1571, 1579-80 (1972). To contend that an employer should expect Government action to adjust retroactively the economic terms

of collective bargaining agreements covering past employment is to suggest that the *fundamental premise* of national labor policy has been a cruel and deceitful hoax, using the good faith of employers to aid in their entrapment.

Likewise, prior regulation of retirement plans gave no warning of such drastic governmental action. The 1974 enactment of ERISA, far from serving as advance warning, actually cast the net of liability over employers participating in multiemployer pension plans, because heeding the "warning" would have caused immediate termination of such plans and imposition of liability by the 1974 statute in amounts up to 30% of the net worth of each employer. Prior to 1974, multiemployer pension plans were regarded under the tax laws and under the labor laws as "money purchase" or "defined contribution" pension plans under which the obligation of the employer was established in terms of a "fixed contribution" payable to the pension plan, rather than a "fixed benefit" payable to the employee.

To take the property of the employer under such circumstances in the guise of "regulation" would rob the Taking Clause of its intended meaning, when the historic role of the Court must be to preserve in complete fullness the fundamental human liberties expressly protected by the Constitution. The right to own the fruits of private endeavor is the right most fundamental to the functioning of liberal democracy, and is a key limitation on the power of the state over the individual.

The "withdrawal liability" statute takes property for *private* use, even though legislative authority to determine "public use" is coterminous with the police power of the state, because Congress has no proper interest in determining which of two private persons owns wealth. The property taken by this statute is money, which is fungible,

and the ownership of particular money can be of no public concern. This case presents the absolute, bare essence of the "public use" limitation in the Taking Clause.

The "withdrawal liability" statute makes no provision for compensation of the employer from whom property is taken, but neither is a Tucker Act remedy expressly withdrawn. *Cf., Monsanto,* ____ U.S. at ____, 104 S.Ct. at 2880. However, withdrawal of a Tucker Act remedy must be implied, otherwise Congress necessarily intended to pay money as compensation for the taking of money, thereby opening the Federal Treasury to the financial burden of paying the costs of privately created retirement benefits.

Upon due consideration, the withdrawal liability statute takes private property for private use without just compensation, in violation of the Taking Clause. Accordingly, the statute must be stricken in order to avoid the much more significant infringement of constitutionally protected liberty.

Invalidation of "withdrawal liability" requires that the inseparable "premium" statute enacted in 1980 be nullified, because Congress would not have enacted one without the other and neither can be fully operative as a law without the other. *I.N.S. v. Chadha,* ____ U.S. ____, ____, 103 S.Ct. 2764, 2775 (1983).

Finally, the 1974 premium statute should be nullified as a violation of the Separation of Powers principle because the statute authorizes PBGC to use the funds collected "in its discretion" without any "intelligible principle" to serve as guidance. *Hampton & Co. v. U.S.,* 276 U.S. 344, 409, 48 S.Ct. 348, 352 (1928). PBGC should be enjoined permanently from taking any action to enforce the statutes declared invalid.

ARGUMENT

I

THE WITHDRAWAL LIABILITY STATUTE TAKES PRIVATE PROPERTY FROM ONE PERSON AND TRANSFERS OWNERSHIP TO ANOTHER FOR PRIVATE USE, WITHOUT PROVIDING JUST COMPENSATION.

This case presents the most significant Taking Clause issues faced by the Court in recent times. During the framing of the Constitution, a deeply held suspicion of representative democracy was the prospect of a legislative body influenced by majoritarian factions to oppress other less powerful citizens. The most heinous offense feared was the possibility that Congress might actually require the transfer of privately owned property from one disfavored group of citizens to other private beneficiaries. Almost 200 years after ratification of the Constitution, that offensive legislative action has come to pass in the guise of socioeconomic regulation of contracts. Fortunately, the Framers of the Constitution erected the Taking Clause of the Fifth Amendment as an express prohibition against such legislative conduct, and furnished a sufficiently clear record of the protections intended for the fundamental freedoms involved. As will be shown, the recognition and preservation of rights protected by the Taking Clause reach to the very essence of successful political democracy, and must prevail over the dictates of any single statutory scheme.

A. The Framers Of The Constitution Intended To Prohibit Action By The Federal Government Transferring Private Wealth From One Person To Another.

James Madison expressed eloquently at the constitutional convention his concern for the protection of the

rights of individuals from oppression at the hands of a democratic legislature influenced by more powerful factional interests.

> "In future times a great majority of the people will not only be without landed, but any other sort of, property. These [may] . . . combine under the influence of their common situation; in which case, the rights of property and the public liberty, [will not be secure in their hands]. . . ."
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> 2 The Records of the Federal Convention of 1787, 203-04 (M. Farrand ed. 1911).

In his letter to Thomas Jefferson of October 14, 1787, Madison stated further this concern for protecting minority rights against legislative action to redistribute private property:

> "In all civilized societies, distinctions are various and unavoidable. A distinction of property results from that very protection which a free Government gives to unequal faculties of acquiring it. There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest . . . [These distinctions will produce dissention and faction.] However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind . . . will continue to view them in a different light. It remains then to be enquired whether a majority having any common interest, or feeling any common passion, will find sufficient motives to restrain them from oppressing the minority." *Reprinted in* 5 *The Writings of James Madison* 29, G. Hunt ed. (New York: Putnam, 1900-1910).

Madison had witnessed first hand the propensity of legislatures to serve popular desires while serving in the Virginia House of Burgesses.

> "In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of Conscience, it is well known that a religious establishment [would] have taken place in that State, if the Legislative majority had found as they expected, a majority of the people in favor of the measure.... Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."
>
> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in id.* at 272.

In *The Federalist* Number 10, Madison argued for a republican, rather than a purely democratic, form of government as essential to the preservation of minority rights, particularly the right of ownership in private property.[4] When its ratification was assured, Madison

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[4] "Complaints are every where heard ... that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority....

"... [T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in

reversed his earlier opposition to any alteration of the Constitution, *see* Letter from James Madison to George Eve (Jan. 2, 1789) *reprinted in* 5 *The Writings of James Madison* 319-21, n. 1, and supported amendments as "additional guards in favor of liberty," *id.*, introducing on June 8, 1789, a draft of twelve proposed amendments to the first session of Congress. One of the twelve amendments was:

> "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." 1 Annals of Congress 434 (J. Gales ed. 1789). Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 595 (1972).

The Taking Clause of the Fifth Amendment was then adopted with the specific intent to protect rights in ownership of property from Congress, since ". . . a law that takes property from A. and gives it to B. . . . is against all reason and justice." *Calden v. Bull*, 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798).

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society . . . A landed interest, a manufacturing interest, a merchantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes actuated by different sentiments and views. The regulation of various and interfering interests forms the principal task of modern legislation. . . .

". . . When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens . . .

"[In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . .

"A republic . . . promises the cure for which we are seeking. . . ." The Federalist No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868).

While Madison is widely regarded as the "father" of the Constitution, his views regarding the central role of an individual's freedom to acquire and own property were widely shared among the Framers and others who influenced them. *See* B. Schwartz, *A Commentary on the Constitution of the United States: Part II, The Right of Property* 18-22 (1965), and *Part III, The Rights of the Person* 8 (1968); Special Project, *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 Vand. L. Rev. 681, 682-83 (1974). John Adams held the view that "property must be secured or liberty will not exist." (P. Freund, *The Supreme Court in the United States* 35 (1961)). John Locke, who provided "the accepted theory of government in America when the American doctrine of eminent domain was being hammered out" (Stoebuck, *A General Theory of Eminent Domain, supra*, 47 Wash. L. Rev. at 586), believed the protection of individual rights in property to be essential to the nature of liberal government: "For the preservation of Property being the end of Government, and that for which men enter into Society, it necessarily supposes and requires, that the People should have Property * * *." J. Locke, *An Essay Concerning Civil Government*, in J. Locke, *Two Treatises of Government*, 378-80 (P. Laslett ed. 1960). *See* Stoebuck, *A General Theory, supra*, at 585-86, regarding the essence of Lockeian social contract theory. Madison himself reiterated: "Government is constituted no less for protection of the property, than of the persons, of individuals." *The Federalist* No. 54 at 370 (J. Cooke ed. 1961).

B. The "Withdrawal Liability" Statute Effects A Taking Of Property.

This Court recently traced its experience and reasoning in dealing with issues raised under the Taking Clause of the Fifth Amendment as follows:

> "As has been admitted on numerous occasions, 'this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action" ' must be deemed a compensable taking. (Citations omitted.) The inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry. (Citations omitted). *The Court*, however, *has identified several factors that should be taken into account when determining whether a government action has gone beyond 'regulation' and effects a 'taking.'* Among these factors are: *'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'* " (Emphasis added.) *Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2874-75 (1984).

(1) *The Character Of The Governmental Action.*

The "withdrawal liability" statute enacted by Congress requires one person (an employer) to pay money to another party (a pension trust) if the employer is unable to reach a new collective bargaining agreement with his employees' union requiring additional contractual payments to the pension trust. In essence, the statute requires a transfer of wealth from *A* to *B*, *A* and *B* each being private parties.[5]

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[5]This statutory requirement is essentially different from "regulation." To "regulate" is "to prescribe the rule by which [conduct] is to be governed," and such regulation may "aid, foster and protect the [conduct, or] prohibit it." *U. S. v. Darby*, 312 U. S. 100, 113, 61 S.Ct. 451, 456 (1941). Many aspects of ERISA and some provisions of the MPPAA comprise "regulation" of conduct, but § 1381(a) is plainly legislative conduct of a different nature. This statute requires ownership of property to be delivered from one party to another — obviously a legislative act which takes property. As will be shown, application of the Taking Clause limitation to this legislative conduct cannot be avoided merely by enacting the "taking" statute as part of

The statute is not fairly characterized as regulating an existing collective bargaining agreement between the employer and the union, because the event which triggers the statutory "taking" is the employer's failure to achieve a consensual *future* agreement with a labor union.[6] Obviously, mutual agreement on the terms of a future contract with a union is outside the discretion and control of the employer and, therefore, the statute effectively takes private property based on an event beyond the control of the deprived party.[7]

Moreover, the statutory taking of property from the employer cannot be characterized fairly as a governmental effort to regulate the administration of multiemployer pension plans. The administration of such a pension plan is outside the control of the individual employer. Each union-sponsored employee pension trust is required by Congress to be established by a written agreement, with

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a "reticulated" statutory scheme which involves other "regulatory" provisions.

[6]Failure to achieve a new collective bargaining agreement may result from disagreement on any issue which is a mandatory subject for collective bargaining, *i.e.*, any issue relating to "wages, hours and other terms and conditions of employment." *See, Allied Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164, 92 S.Ct. 383, 389-90 (1971). The "withdrawn" employer may have been willing to continue pension contributions, but unwilling to agree to other bargaining proposals by the union. Of course, the union has a duty to represent the interests of active employees, but no statutory duty to represent retirees in negotiations with the employer. *Id.*, 404 U.S. at 181, 92 S.Ct. at 398, n. 20.

[7]The brief *amicus curiae* filed by the American Trucking Associations, Inc. argues that the MPPAA, in effect, requires the employer to carry on its business at a loss, in violation of the Taking Clause, citing *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396, 40 S.Ct. 183 (1920), and a subsequent line of cases. Indeed, the MPPAA provides for the degree of "loss" to be defined by the terms of the future agreement required by the labor organization.

assets "held in trust" and administered "for the sole and exclusive benefit of the employees . . . and their families and dependents . . ." 29 U.S.C. § 186(c)(5).

> "[N]othing in the language of § 302(c)(5) [29 U.S.C. § 186(c)(5)] reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed. (Footnote omitted.) And the legislative history of the LMRA confirms that § 302(c)(5) was designed to reinforce, not to alter, the long-established duties of a trustee.
>
> ". . . In sum, the duty of the management-appointed trustee of an employee benefit fund under Section 302(c)(5) is directly antithetical to that of an agent of the appointed (sic) party.
>
> "Whatever may have remained implicit in Congress' view of the employee benefit funds trustee under the [LMRA] became explicit when Congress passed the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829. ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-32, 101 S.Ct. 2789, 2794-95 (1981).

Thus, with the discretionary administration of multiemployer pension plans clearly beyond the control of the individual employer, the "withdrawal liability" statute cannot be fairly characterized as a legislative effort to regulate the prudent administration of such plans.

Nor may the taking of the employer's property be viewed as a loss resulting from "the consequences of his own neglect" or his failure to comply "with reasonable regulatory restrictions the legislature has imposed." *Cf., U.S. v. Locke*, ____ U.S. ____, 105 S.Ct. 1785, 1799 (1985).

The individual employer is powerless to avoid the statutory taking of property except by consenting to new contractual terms specified by another private party (the union).

By comparison, the Three Judge Court below found "no property at issue in this case" (JA 111), characterized the governmental action as mere interference with a "purely contract-based 'right' to avoid liability for further contributions to the pension plans . . ." and declined ". . . to consider the contingent right to escape one's own liability, in derogation of statutory policies, as property under the takings clause." *Ibid.* This characterization inaccurately asserts the existence of "one's own liability", since without dispute the individual withdrawing employer has *no further contractual liability* to the affected pension plan in the absence of the money obligation imposed as "withdrawal liability" by the statute. The sophistic analysis of the Three Judge Court implicitly assumes that the Congress can impose by statute a new "contract" obligation, and then merely abrogate contractual defenses to that obligation, thereby taking property without ever encountering the prohibition of the Taking Clause.

Congress can not empower itself to take property merely by calling the taking a "consequential incidence" of economic regulation. *See U. S. v. Security Industrial Bank,* ____ *U.S.* ____, ____, 103 S.Ct. 407, 411-12 (1982), discussing *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 55 S.Ct. 854 (1935), and *Armstrong v. U. S.,* 364 U.S. 40, 80 S.Ct. 1563 (1961). In those cases, this Court found Taking Clause protection for lien rights owned by: (1) a lender in real estate *(Radford)*; (2) a materialman in naval boats under construction *(Armstrong)*; and (3) a lender in consumer household appliances *(Security)*. Properly, the Court declined to permit

characterization of the challenged statutes in those cases as "regulation" of contracting practices in farm lending, naval ship building, or consumer lending to justify avoidance of the Taking Clause.

As the district court and the court of appeals below have recognized (JS *App.* 19-20, 32, 33, 35, 46-48, 49), the parties to the collective bargaining agreements and the Trust Agreement in this case created clear and unambiguous obligations which are fully performed when the agreements expire. Such a contractual relationship affords no better foundation than Congress might find in other societal relationships to serve as the regulated *nexus* giving rise to a perceived public interest in achieving the transfer of property between private parties. Surely employers who have bargained in good faith and fully performed the resulting mutual agreement are not more culpable or vulnerable to such legislative action than, for example, citizens in a community which has engaged in a pattern of conduct offensive to a popular majority. If the pattern of conduct is entirely lawful at the time and, indeed, even salutary in its beneficial effects on those affected most directly [*cf., Allied Structural Steel v. Spannaus*, 438 U.S. 234, 250, 98 S.Ct. 2716, 2725 (1978)], are the citizens of that community subject to a statutory redistribution of their property based on the past conduct? The Taking Clause and this Court would surely not permit it to be so, and this case is not substantially different. Those who framed the Constitution intended to strengthen commerce by encouraging individuals to enter into contractual relationships and to offer employment to others — not to authorize Government to subject its most enterprising citizens to retroactive burdens and forfeitures for having done so.

If Congress can transfer money from an employer to a pension trust by "regulation," then why may Congress not

take land from a dairy farmer by "regulation" to serve the public interests through an interstate highway system, since any adjoining landowner would certainly be intimately involved in the need for such a highway? Moreover, if Congress has such "regulatory" taking power, then why might the State of Hawaii not have chosen to "regulate" the land leases involved in *Hawaii Housing Authority v. Midkiff*, ___ U.S. ___, 104 S.Ct. 2321 (1984), simply requiring the lessor to transfer fee title to the lessee upon termination or upon achieving certain tenure specified by the legislature, with no provision for compensation to the deprived landowner? Granting such power to Government would be tantamount to embracing fully the redistributive social theories of Rousseau ["the state's proper function is to redistribute, to the end that 'all have something and none of them has too much' "], *see,* Stoebuck, *A General Theory of Eminent Domain, supra,* 47 Wash. L. Rev., at 587-88, a divergence of a full 180 degrees from the Lockeian principles adopted by the Framers.[8]

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[8]"For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity underlies constitutional provisions as diverse as the rule against takings without just compensation, see *PruneYard Shopping Center v. Robins,* [*infra*, 447 U.S. at 82-83 and n. 7, 100 S.Ct at 2041 and n. 7], and the Equal Protection Clause." *Richmond Newspapers, Inc. v. Virginia, infra,* 448 U.S. at 594, 100 S.Ct. at 2837 (Mr. Justice Brennan, concurring in the judgment).

Equity alone, of course, will not suffice. The conviction must be shared that the constitution will be enforced according to the intent of its Framers, not "repealed by implication" to accommodate the views of contemporary social theoreticians who, with Rousseau, would argue that the complexities of modern society require more sophisticated and sweeping, powers of government. If such theories are to be put into practice, they should first be subjected to the rigors of the constitutional amendment process.

Thus, the fair characterization of the governmental action is the most crucial element of Taking Clause protection. As shown above, the withdrawal liability statute effects neither regulation of the employer's collective bargaining agreement nor regulation of the fiduciary adminstration of the pension plan. The statute takes money from the employer and transfers it to the pension trust unless the employer reaches a new agreement with the union requiring additional contributions to the pension trust. Were Madison and the Framers to confront a description of this congressional act as "imposing by statute a contract obligation, together with concurrent abrogation of contractual defenses," undoubtedly they would recognize it simply for what it is: a governmental taking of property.

(2) *The Economic Impact Of The Governmental Action.*

The employer who must pay "withdrawal liability" imposed by the statute is required to pay money, either in a lump sum or according to a schedule of installments with interest. 29 U.S.C. § 1382, § 1399(b)(1), § 1401(d). The deprived party must actually part with his money — the ownership, use and enjoyment of his private property.[9] The deprived party does not retain ownership of his property, with its use merely limited by governmental regulation as was the case in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035 (1980), and in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646 (1978). Although the specific amount of "withdrawal liability" will vary greatly according to the particular pension plan and the employer, the monetary amounts are generally quite substantial in relation to the

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[9]If any room for doubt exists, money is property. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 340, 89 S.Ct. 1820, 1822 (1969).

size and worth of the employer.[10] In practically all cases, the severity of the economic impact of withdrawal liability on the employer has a significantly higher magnitude than existed, for example, in *Webb's Fabulous Pharmacies, Inc., v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446 (1980), [where interest on funds deposited in court pending litigation was protected from governmental taking], or in *Kaiser Aetna v. U. S.,* 444 U.S. 164, 100 S.Ct. 383 (1979) [where the owner of an improved pond was required to be compensated for any "taking" of a public right of access into the body of water]. To match the severity of withdrawal liability, the complaining party in *Webb's* would have to lose the funds deposited, and the pond owner in *Kaiser Aetna* the pond itself. The amount of withdrawal liability may actually exceed the entire net worth of the employer as a going concern, although the liability is limited between 30% and 80% of net worth if the employer is in bankruptcy or liquidation. *See* 29 U.S.C. § 1405.

(3) *Interference With Reasonable Investment-Backed Expectations.*

The reasonable expectation of the employer is that, when his justly incurred debts are paid, the fruits and profits of his labor and investment will remain his private property.[11] In the context of this case, the only monetary obligations contractually incurred by each employer arise from the terms of a collective bargaining agreement between the employer and a union. Under longstanding

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[10]The existing withdrawal liability claim against Woodward, a relatively small, family-owned corporation operating a sandpit as a construction materials supply business, is in excess of $200,000.00.

[11]"Private property, in every defense made of it, is supposed to be the guarantee to individuals of the fruits of their own labor and abstinence." John Stuart Mill, *Principles of Political Economy,* pp. 203-204 (Sir William Ashley ed. 1909) (*reprinted in* 1969, New York: Augustus M. Kelley).

and fundamental national policy, each employer had every reason to believe that federal law would require full performance of the consensual undertakings of the two bargaining parties — no more and no less.

(a) *Regulation of Collective Bargaining Agreements*

In *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 282-84, 92 S.Ct. 1571, 1579-80 (1972), this Court traced the history of the "fundamental theme" of the National Labor Relations Act ("NLRA"), beginning with the history of that legislation:

> "It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory."
>
> S.Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

This Court promptly enforced that policy, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 57 S.Ct. 615, 628 (1937), and in 1947 Congress "made this policy an express statutory mandate" by enacting § 8(d) of the NLRA [29 U.S.C. § 158(d)]. *N.L.R.B. v. Burns International Security Services, Inc., supra*, 406 U.S. at 283, 92 S.Ct. at 1580.

At the same time, Congress enacted § 301 of the Labor Management Relations Act of 1947 ("LMRA") [29 U.S.C. § 185] granting federal courts jurisdiction over suits to enforce agreements between employers and unions. The central purpose of § 301 was to assure both parties that the terms of agreement reached at the bargaining table would be faithfully enforced by the courts. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 451-54, 77 S.Ct. 912, 915-17 (1957).

Throughout the history of the NLRA, this Court has repeatedly reminded the National Labor Relations Board and the lower courts that federal law requires unions and employers to bargain in good faith, but otherwise the bargaining parties "should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *N.L.R.B. v. Insurance Agents,* 361 U.S. 477, 488, 490, 80 S.Ct. 419, 426 (1960). *See, also, N.L.R.B. v. American National Insurance Co.,* 343 U.S. 395, 404, 72 S.Ct. 824, 829 (1952). In *H. K. Porter Co. v. N.L.R.B.,* 397 U.S. 99, 108, 90 S.Ct. 821, 826 (1970), the Court summarized as follows:

> "One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, (footnote omitted) allowing the Board to compel agreement when the parties themselves are unable to agree would violate *the fundamental premise on which the Act is based -- private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."* (Emphasis added.) *Ibid.*

This "fundamental premise" was part and parcel of the congressional intent expressed in enacting § 301:

> "[T]o encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts." S.Rep. No. 105, 80th Cong., 1st Sess., p. 16; *Textile Workers Union v. Lincoln Mills, supra,* 353 U.S. at 454, 77 S.Ct. at 916.

When the Government had elicited employers and unions to place their full faith and confidence in collective

bargaining upon this "fundamental premise" for 40 years, employers could reasonably expect that the same policy would continue. *At the very least,* the bargaining parties could reasonably expect that the Government would not attempt to modify the substantive obligations of the bargaining parties arising from collective bargaining agreements covering employment during years prior to enactment of the new congressional policy. Yet this is precisely the effect of the challenged "withdrawal liability" statute upon employers whose collective bargaining agreements have required payments on behalf of their employees to pension trusts administering multiemployer pension plans.

(b) *Regulation of Retirement Plans*

PBGC defends the 1980 enactment of the withdrawal liability statute by contending that any employer should have known "that its contracts were . . . subject to regulation" because ERISA had been enacted in 1974 and, "[e]ven prior to 1974, federal regulation of pension benefits served to put employers on notice that they were subject to congressional regulation if they chose to offer deferred compensation to employees." *Motion to Affirm,* p. 7.

Dealing first with the contention that enactment of ERISA gave fair notice of the 1980 amendments creating "withdrawal liability," the 1974 legislation actually served to entrap employers participating in multiemployer pension plans by use of a governmental taking statute similar to "withdrawal liability." Section 4064 of ERISA, 88 Stat. 1031, 29 U.S.C. § 1364, made each employer participating in a multiemployer pension plan liable for a prorata share of the cost of unfunded vested benefits described in the pension plan if the pension plan were to be terminated within five years after the withdrawal of the employer. That "contingent liability" was

limited by Section 4062(b)(2) of ERISA, 88 Stat. 1029, 29 U.S.C. § 1362(b)(2), to a maximum of 30% of the net worth of the individual employer. The effect of the 1974 statute, therefore, was not to provide "fair warning" but to impose immediate liability in the event each employer elected to end its collective bargaining agreement, thereby necessarily causing termination of the multiemployer pension plan.

In response to the contention that any single employer could withdraw after 1974 without causing termination so long as other employers remained in the multiemployer pension plan, the constitutional soundness of a statute cannot be made dependent upon the willingness of some affected parties to waive its effects upon them. Thus, if the suggestion that the 1974 statute served as "fair warning" is to be viewed in the proper light, the statute must be evaluated as to its impact when every affected party actually heeds the warning. Plainly, the net of liability was first cast in 1974, and each employer's statutorily imposed liability would have become due and payable at that time if all had heeded the "fair warning" to abandon participation in their multiemployer pension plans. Instead, this action was filed in 1975, and amended after the 1980 statutory revisions, to claim constitutional protection against the offensive legislative conduct.

Likewise, pre-1974 regulation of retirement plans gave no fair warning of an impending taking of property from employers participating in such plans. Before 1974, the distinction between a "defined contribution plan" and a "defined benefit plan" was whether the employer promised a "fixed contribution" or a "fixed benefit."[12]

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[12] J. J. Melone, *Collectively Bargained Multi-employer Pension Plans*, at 19 (1963).

The Operating Engineers Pension Plan involved in this case and other such multiemployer pension plans were qualified under § 401(a) of the Internal Revenue Code [26 U.S.C. § 401(a)] as "money purchase pension plans" on the basis that the employer's contributions under such plans "are fixed without being geared to profits."[13] At the same time, the U.S. Department of Labor viewed each multiemployer pension plan as a "defined contribution plan."[14]

Labor organizations were well informed of the significance of the distinction between an employer's promise to pay a "fixed contribution" and a promise to pay a "fixed

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"Pension Plan benefit formulas may be broadly classified by the nature of the employer's financial commitment, *i.e.*, in terms of defined contributions or defined benefits."

[13] *I.R.C. Reg. § 1.401-1(b)(1)(i)*:

"... a Plan ... will, for the purposes of Section 401(a), be considered a pension plan if the employer contributions ..., in the case of money purchase pension plans, ... are fixed without being geared to profits."

[14] An official publication of the U.S. Department of Labor contained the following definitions:

"Defined Benefit Plan. A pension plan which provides a definite schedule of benefits. *The employer's contributions under such a plan are determined actuarially on the basis of the benefits expected to become payable.* Also called 'fixed benefit' plan." (Emphasis added.)

"Defined Contribution Plan. *A pension plan under which the employer's contributions are fixed, e.g., a fixed amount for each hour worked or a fixed percentage of compensation. Two types are: money purchase plans and collectively bargained multiemployer plans.*" (Emphasis added.)

Glossary — Correspondent Course On Pension Plans, Office of Labor-Management and Welfare Pension Reports, U.S. Department of Labor, October, 1969.

benefit."[15] This knowledge was pursued to great advantage in collective bargaining negotiations aimed at achieving participation in multiemployer pension plans by millions of employees otherwise foreclosed from providing for their retirement, and by 1974 such plans covered about 8 million participants. Labor unions could not have been so successful if saddled with the burden of persuading small employers to accept open-ended liability for the cost of benefits, rather than liability for a known, fixed contribution.[16]

Even the process of enacting ERISA itself gave no warning of any impending reversal of national policy. The chairman of the House Ways and Means Committee (Mr. Ullman) stated on the floor of the House at the time of enactment that "plan termination insurance is mandatory for private defined benefit plans" without giving the slightest indication that the Joint Conference Committee intended any abandonment of the traditional distinction

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[15]"... The benefit approach has certain serious drawbacks. Mapping out all of the details and provisions of a pension plan across a bargaining table can be a complicated and harrowing proposition, that can drag on for weeks and even months. ..."

"... From the standpoint of negotiations, the fixed contribution approach simplifies the process of collective bargaining tremendously. No one has to be an expert to bargain on the straight question of how much money the employer is to pay; negotiations can proceed in pretty much the same fashion as though a straight wage increase were at issue." L. Kirkland, *Pension Plans Under Collective Bargaining — A Reference Guide For Trade Unions,* Department of Social Security of AFL-CIO, pp. 58-62 (1954).

[16]Indeed, if the trustees of multiemployer pension plans were deemed to be representatives of contributing employers for purposes of establishing and underwriting pension benefits, labor unions would lose the right to strike to require employers to participate in existing multiemployer plans with pre-designated trustees. See § 8(b)(1)(B) of the NLRA [29 U.S.C. § 158(b)(1)(B)] and *N.L.R.B. v. Amax Coal Co., supra.*

between a "defined contribution plan" and a "defined benefit plan." 3 *Legislative History of ERISA,* 4678. Not until the first decision of the court of appeals in this action was the effect of ERISA made apparent: the Joint Conference Committee had expressed the definition of "defined contribution plan" in such intricate wording as to make substantially every existing pension plan a "defined benefit plan." *See, Connolly v. PBGC,* 581 F.2d 729, 732-33 (9th Cir. 1978); JS *App.* 36-37.

(c) *The General Perspective of Expectations*

Viewing the entire history of governmental policy toward collective bargaining parties and employee retirement plans, nowhere can fair warning be found of the potential for statutory rebalancing of economic agreements reached between bargaining unions and employers. In the context of their reasonable expectations, the employers made investments of labor, ingenuity and capital, paid their employees the agreed compensation, and realized whatever profits or losses their enterprises produced. This is the essential process, described by Madison as naturally occurring in all free and civilized societies, which properly should assure each person the ownership of the fruits of his productivity. The Taking Clause was intended as the express guarantee of that right for all persons living under this Government.

The "fair warning" contention advanced on behalf of the challenged "withdrawal liability" statute would create a constitutional environment in which every citizen is deemed forewarned that he pursues his interests in peril of future enactments by the Government. This is an entirely unsatisfactory substitute for the environment guaranteed by our Constitution in which the inalienable rights of all persons are defended boldly by an express and reliable Bill of Rights.

Does the statute take property? To the person who has pursued his business, bargained in good faith, fully performed his consensual agreement and accumulated whatever profits or losses the rigors of competition have yielded, the answer must be affirmative. Thousands of such persons, dubbed by the challenged statute as "the withdrawn employer," face the outright loss of a major portion of their personal assets for no reason other than Government action. This is not a mere regulatory measure which will alter digits on corporate balance sheets and otherwise pass unnoticed, but an unparalleled and indelible move to take property from certain persons and give it to others in such a heavy-handed manner as to scar permanently the welfare and ethos of the deprived persons. No amount of rationalization for "socioeconomic contractual regulation" could explain or rectify the damage done to those persons or to the essential constitutional fabric of our liberal democracy by permitting this legislative act, particularly when the Taking Clause was specifically intended to bar such a result. As previously noted, Madison feared that a bill of specified rights in the Constitution might prove to be a mere "parchment barrier" when confronted with the will of a popular majority expressed through an enacted statute. 5 *The Writings of James Madison, supra,* at 271-275. The Court should not permit this to be the case in which Madison's foreboding is proved to be true as to the Taking Clause.

C. The Statute Takes Property For Private Use.

While the Taking Clause is an express protection set forth in the Fifth Amendment, and the power of the Government to seize private property for public use is merely implied in the power of the sovereign, the implied power of eminent domain is well established in the decisions of this Court. Twice recently this Court has held that the authority of Congress to declare a "public use"

requirement for the taking of private property is "coterminus with the scope of a sovereign's police powers" and that the role of the courts in determining "what constitutes a public use is extremely narrow." *Ruckelshaus v. Monsanto Co., supra,* ____ U.S. at ____, 104 S.Ct. at 2879; *citing Hawaii Housing Authority v. Midkiff, supra,* ____ U.S. at ____, 104 S.Ct. at 2329 (1984), and *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102 (1954). However, this Court has repeatedly shown willingness to give close scrutiny to assure the satisfaction of constitutional requirements when fundamental rights "deemed essential to the preservation of liberty" are involved, and "[s]urely, private property may be essential to the protection of liberty." *See* Thomas J. Coyne, "Hawaii Housing Authority v. Midkiff: A Final Requiem For The Public Use Limitation Of Eminent Domain?", 60 *Notre Dame L. Rev.* 388, 393-97, notes 81, 84, 86 and accompanying text.

This case involves the bare essence of the protection intended by the Taking Clause: the prohibition against governmental seizure of a person's wealth for transfer to another private party. The nature of the property taken as withdrawal liability — *money* — makes any public interest in the use of the property taken an impossibility, since the Taking Clause permits no Governmental interest, either under the police power or under the power of eminent domain, in determining whether one person or another owns wealth. While the public may have a broad range of interests in the ownership and use of particular property, *e.g.,* real estate or pesticides (*cf., Monsanto*), *the Taking Clause does not permit Congress to have an interest in determining which of two private citizens owns money.*

Moreover, *money is fungible property,* entirely indistinguishable from one dollar to the next, so the Government cannot substantiate a public interest in determining the use of the *particular* property to be taken from the

employer as "withdrawal liability." No particular money is different from any other money. Not only does this circumstance render impossible any contention that this particular property must be taken, the irrational result of a view that money can be seized for "public use" would necessarily require "just compensation" therefor — presumably money in an equal amount. When this Court finally draws the line around what is *not* property seized for a "public use," the line necessarily must be drawn short of permitting seizure of a person's monetary wealth.

The taking of money by the challenged statute in this case cannot be imbued with a "public use" by the nature of the use to which the funds are put. In every case, the direct recipient of the money taken is another private party, a multiemployer pension trust. The Funds will then be directed to the private use and enjoyment of individual beneficiaries of the particular trust, according to rules established by private fiduciaries. This remains a private use of property, rather than a public use, partly because of the private nature of the parties benefited, but fundamentally as a consequence of the fungible, monetary nature of the property transferred. No uniqueness, identity or particularity is present in the nature of the property to empower the theory of eminent domain with a public necessity when the property to be taken is money.

Recognition of broad legislative authority to determine "public use" has occurred in cases involving *compensated* takings.

> "To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.' (citations omitted.) . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held

> a *compensated* taking to be proscribed by the Public Use Clause." (Emphasis added.) *Hawaii Housing Authority v. Midkiff, supra,* ____ U.S. at ____, 104 S.Ct. at 2329-30.

At the same time, every decision of this Court finding a "public use" underlying a governmental seizure of property has reached that conclusion with respect to particular property whose private ownership must be displaced for the public good. Because finding a public purpose for a governmental displacement of a private person's ownership of money is "palpably without reasonable foundation," *Midkiff,* ____U.S. at____, 104 S.Ct. at 2329, the "withdrawal liability" statute fails to satisfy the "public use" requirement of the Taking Clause.

D. The Statute Provides No Compensation For The Property Taken From The Withdrawn Employer.

Equitable relief to enjoin the taking of private property for public use is not available when a suit for compensation can be brought against the Government after the taking. *Ruckleshaus v. Monsanto Co., supra,* ____ U.S. at ____, 104 S.Ct. at 2880. Generally, such a suit for compensation may be brought under the Tucker Act, 28 U.S.C. § 1491, *ibid.,* unless in the challenged statute "... Congress has ... *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded ... upon the Constitution.' " *Id.,* ____ U.S. at ____, 104 S.Ct. at 2881. As in *Monsanto,* nowhere in the statute or its legislative history is there discussion of the interaction between the MPPAA and the Tucker Act, and any withdrawal of jurisdiction would be by implication only. Such "repeals by implication are disfavored." *Ibid.* Nevertheless, even if the employer's property is deemed to be taken for a "public use," the withdrawal liability statute should be invalidated for

failure to provide "just compensation" for the property taken as required by the Taking Clause.

Two fundamental facts concerning the "withdrawal liability" statute make an implied withdrawal of jurisdiction for a Tucker Act remedy uniquely compelling in this case. First, the property taken from the withdrawn employer is money, and Congress must necessarily be presumed irrational to intend that money be taken from an individual by one statute, while another statute pays the money back in a suit for "just compensation." Second, an intention to provide a Tucker Act remedy to each employer whose property is taken as "withdrawal liability" would have the effect of opening the treasury of the Federal Government to the potentially limitless financial burden of underwriting the cost of privately created pension benefits. The unwillingness of Congress to commit the U. S. Treasury to a general obligation even for federally created benefits administered by the Social Security Administration is longstanding and well documented. These circumstances negate the possibility that Congress intended the Tucker Act to complement the MPPAA by affording recourse to "just compensation" for property taken from the employer as "withdrawal liability."

E. Protection Of Rights In Private Property Is Essential To The Preservation Of Liberty And The Functioning Of A Liberal Republic.

The Court has made plain that no dichotomy should be permitted in the judicial enforcement of constitutional protections of rights in property as compared to other constitutionally protected rights.

> "[T]he dichotomy between personal liberties and property rights is a false one. *Property does not have rights. People have rights.* The right to enjoy property

> without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, *a fundamental interdependence exists between the personal right to liberty and the personal right to property.* Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. (Citations omitted.)" (Emphasis added.) *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972).

Freedom of speech, freedom of the press, the right of peaceful assembly, the right of privacy — all such rights are diminished almost beyond recognition if a person's property can be taken by the Government and given to others.[17] The right to acquire and own property without fear of governmentally-imposed forfeiture is the personal freedom most fundamental to a flourishing democratic society, and is a key limitation on the power of the state over the individual. *See* M. Novak, *The Spirit of Democratic Capitalism,* pp. 83-84, 153, 244, 307, 325-326 (Simon

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[17] "[T]he First Amendment does not speak equivocally. . . . *It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.*" (Emphasis added.) *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 576, 100 S.Ct. 2814, 2827 (1980), Mr. Chief Justice Burger writing in support of the judgment of the Court, and quoting *Bridges v. California,* 314 U.S. 252, 263, 62 S.Ct. 190, 194 (1941).

Fully as much must be said of the unequivocal, explicit language of the Taking Clause of the Fifth Amendment. Recognizing that the First Amendment, indeed, "has a *structural* role to play in securing and fostering our republican system of self-government," *id.*, 448 U.S. at 587, 100 S.Ct. at 2833 (Mr. Justice Brennan concurring in the judgment), that structural role in substantial part is not an end in itself, but a means to an end of achieving security for individual rights in property.

& Shuster, 1982). Clearly recognized and carefully protected by Madison and the Framers of the Constitution, this fundamental premise of liberal society is receiving broader, rather than diminished, acknowledgment over the course of time.[18]

The substantial expansion of Governmental power inherent in Court approval of the challenged statute would comprise a historic regression from the pinnacle of achievement in the protection of human liberties which is embodied in the Constitution and its Amendments. The crucial role of this Court must be to preserve and give fullest substance to those liberties, rather than yielding to the constant, persistent efforts of the Government to increase central authority for its own advantage.

In applying its analytical techniques to preserve Taking Clause protection, the Court must be wary to avoid a *de facto* test that simply asks whether the particular use of power by Congress shocks the conscience of the Court. If the test for whether property has been taken is, at bottom, an inquiry into whether the specific use of legislative power has a sufficiently beneficial objective, then the Court will have succumbed to attesting the existence of legislative power based on tacit approval of the beneficial ends of a particular use of that power. Use of statutory ends to justify the means of legislative power to take

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[18]"[P]rivate property, including that of productive goods, is a natural right possessed by all, which the state may by no means suppress." John XXIII, *Mater et Magistra*, 18 (1961)

"[E]xperience and history testify that where political regimes do not allow to private individuals the possession also of productive goods, the exercise of human liberty is violated or completely destroyed in matters of primary importance. Thus it becomes clear that in the right of property, the exercise of liberty finds both a safeguard and a stimulus." *Id.*, at 109.

property by "regulation" is fatally flawed in its constitutional logic and would eventually leave the Court without an adequate intellectual basis for curbing use of the same power to achieve other ends chosen by Congress. In essence, the Court must not test the statute only by the anachronistic standard of "substantive due process" — asking whether the means and ends of the particular statute are consistent with the Court's own conscience. Instead, the Court must look squarely at the challenged statute and ask whether Congress has sought to achieve its ends by taking property; if so, the statute must satisfy the Taking Clause. Any less rigorous approach allows the taking of property by "regulation," a legislative power whose appetite was known to be so truly voracious that the Framers banned its existence *via* the Taking Clause.

The role of this Court as the cornerstone institution of liberal democracy will become secure when the Court's decisions engender confidence that the growth of Government power at the expense of individual liberties is no longer inexorable. When the Court stands against the Government itself as the fearless defender of each of the freedoms held dear by the Framers of the Constitution, no room exists for doubt that the judiciary may serve primarily as an instrument of central government authority.[19] To achieve this end, the Court must produce courageous results as well as meaningful words, demonstrating for all to see that the high-water mark of human liberty under the Constitution was not reached in 1787, but is yet to be achieved in 1986 and beyond. Protection of political

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[19] "[I]t is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been instigated by the major voice of the community." *The Federalist* No. 78, at 399 (A. Hamilton) (London: J. M. Dent & Sons Ltd. 1911).

expression, religious beliefs, and the rights of the criminally accused will be necessary but insufficient for this purpose. If our self-government is to be continually successful, producing the added increments of wealth which are elemental ingredients of improved welfare for all members of society is essential.[20] To address that fundamental concern of liberal democracy, the Court's demonstration of commitment to the protection of individual rights must have meaning to those persons whose human dignity finds a primary means of expression through economic creativity and productivity.

II.

IF "WITHDRAWAL LIABILITY" IS INVALID UNDER THE TAKING CLAUSE, THE RELATED PROVISIONS OF THE MPPAA REQUIRING PAYMENT OF "PREMIUMS" TO PBGC ARE LIKEWISE INVALID AS INSEVERABLE FROM THE STRICKEN STATUTORY SCHEME.

In a specially mandated report to Congress in 1979, PBGC declared that the annual "premium" payable by multiemployer pension plans to PBGC might actually exceed $80.00 per employee participant under certain asumptions even after taking "employer liability" into account, unless its entire package of legislative proposals was adopted.[21] Congress eventually adopted those proposals substantially intact, including provisions for a staged increase of "premium" rates from $1.00 per employee annually to $2.60 per employee annually. 29 U.S.C. § 1306(a)(3)(A)(ii).

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[20]M. Novak, *The Spirit of Democratic Capitalism, supra,* at 15-16, 202-205, 210, 273-285, 304-307, 357.

[21]PBGC Multiemployer's Study, required by P.L. 95-214, July 1, 1978, pp. 1, 2.

Thus, while a determination that "withdrawal liability" is invalid under the Taking Clause would necessarily delete entirely the provisions of Subchapter III, Subtitle E, Part 1 of ERISA [29 U.S.C. §§ 1381-1405] establishing "withdrawal liability," the question remains whether certain other closely related provisions of the statutory scheme must fall at the same time. This case presents the question whether the statutory requirement that "premiums" be paid to PBGC is enforceable if "withdrawal liability" has been stricken as constitutionally invalid.

In *I.N.S. v. Chadha,* ____ U.S. ____, 103 S.Ct. 2764, 2774 (1983), the Court declared that an unambiguous severability provision in the challenged statute "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether [a particular part] was invalid." In *Chadha,* the Immigration and Nationality Act contained a severability provision very similar to § 509 of ERISA [88 Stat. 895, 29 U.S.C. § 1139], which states:

> "If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

This provision was enacted in 1974, while "withdrawal liability" and the increased "premiums" were enacted in 1980 under the MPPAA, and no additional severability clause was included in the MPPAA. The 1980 statute was largely comprised of an amendment to ERISA, which gives rise to the potential for treating the 1974 severability clause as applicable to the 1980 legislation. However, if such an intent existed, Congress did not clearly express it.

What clearly should be conceded by PBGC is that Congress would have designed other provisions of the MPPAA (specifically, the "premium" provisions) very differently if "withdrawal liability" had not been included in the statutory scheme; *i.e.*, "... [Congress]would not have enacted those provisions which are within its power, independently of that which is not." *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S.Ct. 612, 677 (1976), quoted in *I.N.S. v. Chadha, supra,* ____ U.S. at ____, 103 S.Ct. at 2774. Undoubtedly, if "withdrawal liability" is nullified under the Taking Clause, Congress would prefer having the opportunity to begin anew by acting comprehensively to create a statute "fully operative as a law," *Chadha,* ____ U.S. at ____, 103 S.Ct. at 2775, rather than having the remaining financial provisions of the existing statute applied in a piecemeal fashion.

III

THE "PREMIUM" STATUTE ENACTED IN 1974 VIOLATES THE SEPARATION OF POWERS PRINCIPLE BY DELEGATING LEGISLATIVE AUTHORITY TO PBGC.

Partly as a result of the complex and comprehensive nature of ERISA, Title IV of ERISA was enacted in 1974 after wholly insufficient prior study of multiemployer pension plans. In the entire legislative history of ERISA, the chief (and almost only) support for the premise that multiemployer plans were intended to be covered by Title IV was a brief, one-paragraph discussion contained in a staff report issued by the Senate Finance Committee to accompany Senate Bill 1179 on August 21, 1973. That discussion expressed the intent that a pension plan administered by a Taft-Hartley pension trust should "not be treated as a money purchase plan ..." because "the employers in the aggregate have a voice ... in the determination of the forms and levels of benefits ...." 1974 *U.S.*

Code Cong. & Admin. News, p. 4965. S.Rep. No. 93-383. This staff report apparently did not accompany the legislation sent to the Joint Conference Committee as H.R. 2, and the Joint Conference Report did not include an expression of the same intent. H.Conf.Rep. No. 93-1280 (Aug. 12, 1974). 3 *Legislative History of ERISA* 4251 (1976).

Despite the lack of prior study, Congress enacted a requirement that multiemployer plans pay "premiums" to PBGC, and authorized PBGC to use the funds collected "in its discretion" to pay benefits to participants of a terminated multiemployer plan if (a) the terminated plan had existed for five years; and (b) PBGC could determine that such payment of benefits would not "jeopardize the payments [PBGC] anticipates it may be required to make in connection with benefits guaranteed under this title with respect to multiemployer plans which terminate after December 31, 1977." ERISA § 4082(c)(2), 28 U.S.C. § 1381(c)(2), 88 Stat. 1035.

Of course, practically the entire universe of multiemployer pension plans had been in existence for more than five years in 1974, so the first condition is meaningless in most circumstances. And, as PBGC urgently reported to Congress in obtaining an emergency amendment of the effective date of mandatory coverage from January 1, 1978, to July 1, 1979 (Pub.L. 95-214, § 1, Dec. 19, 1977, 91 Stat. 1501], the enacted program of guaranteed benefits was completely unworkable and threatened not only to bankrupt PBGC if allowed to become effective, but also threatened highly uncertain and detrimental effects on the financial stability of multiemployer pension plans themselves. Under such ambiguous and dangerous circumstances, PBGC was disabled from determining rationally that any payment of benefits would not "jeopardize" future payments of enacted guarantees.

Nevertheless, PBGC did in fact determine to pay benefits to the participants of three terminated multiemployer plans, each such plan coincidentally being among the constituents of the chairman of the Senate Human Resources Committee (Mr. Williams of New Jersey), the ranking minority member of the committee (Mr. Javits of New York), or the chairman of the House Subcommittee on Labor-Management Relations (Mr. Thompson of New Jersey), each committee having jurisdiction over the enacted legislation.

Having no "intelligible principle" to control the use of funds, this statute is a forbidden delegation of legislative power. *Hampton & Co. v. U. S.*, 276 U.S. 394, 409, 48 S.Ct. 348, 352 (1928). Such "sharing" of legislative and administrative authority between PBGC and the responsible congressional committees does not comprise enactment of legislation "by the National Congress in [a] step-by-step, deliberate and deliberative process" as required by the Separation of Powers principle. *I.N.S. v. Chadha, supra,* 103 S.Ct. at 2788. Accordingly, the statute delegating such authority is void, and the closely related statute requiring payment of such funds by multiemployer plans to PBGC as "premiums" must fall together, since neither provision can be fully operative without the other. *Id.*, ____ U.S. at ____, 103 S.Ct. at 2774, 2775.

The Three Judge Court declined to reach this issue on grounds of mootness resulting from amendment of the statute, but the issue is by no means moot when the Trustees continue to contest the payment of "premiums" claimed by PBGC under the 1974 statute. In addition, the amended statute contains the same delegation of legislative authority with respect to expenditure of funds on behalf of plans terminated before August 1, 1980. 29 U.S.C. § 1461(c)(2), 94 Stat. 1267.

CONCLUSION

Based on the foregoing, the judgment should be reversed and the case remanded with instructions that judgment be entered on behalf of appellants as follows:

(a) Declaring Part I of Subtitle E of Title IV of ERISA, as amended [29 U.S.C. §§ 1381-1405, 94 Stat. 1217-1243], to be unconstitutional as a violation of the Taking Clause of the Fifth Amendment;

(b) Declaring Sections 4006, 4007 and 4082(c) of ERISA, as enacted in 1974 [29 U.S.C. §§ 1306, 1307, 1381(c), 88 Stat. 1010-1013, 1035], to be unconstitutional as a violation of the principle of Separation of Powers;

(c) Declaring Section 4006(a)(3)(A)(ii) of ERISA, as amended [29 U.S.C. § 1306(a)(3)(A)(ii) 94 Stat. 1264-65], to be unconstitutional as inseverable from the provisions of ERISA declared to be in violation of the Taking Clause; and

(d) Granting a permanent injunction restraining appellee PBGC from enforcing the statutes declared to be invalid.

Dated: July, 1985.

Respectfully submitted,

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QUESTION PRESENTED

Whether the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 are valid under the Taking Clause of the Fifth Amendment to the Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 84-1555 & 84-1567

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

WOODWARD SAND CO., INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the three-judge panel of the District Court for the Central District of California is printed at pages 104-118 of the Joint Appendix (hereinafter "J. App.").

JURISDICTION

These are appeals from a judgment entered by a three-judge court on December 4, 1984. J. App. 119-121. Timely notices of appeal to this Court were filed by appellants

Connolly, *et al.* (hereinafter the "Trustees") on January 31 and March 20, 1985, and by appellant Woodward Sand Company, Inc. ("Woodward") on January 31, 1985. J. App. 122-124. Jurisdiction is based on 28 U.S.C. § 1253 and former 28 U.S.C. § 2282 (repealed by Pub. L. No. 94-381, 90 Stat. 1119, but applicable to "any action commenced on or before [August 12, 1976]," 28 U.S.C. § 2282 note). The original complaint in this case, filed on June 17, 1975, sought, *inter alia*, an injunction on constitutional grounds against the enforcement of the pension insurance premium provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. §§ 1001 *et seq.* (hereinafter "ERISA"). J. App. iii, 1-8. Although issues raised in these appeals relate to statutory amendments that were not enacted until 1980, and the complaint raising these issues was not filed until 1982, all questions presented do arise in an action "commenced on or before" August 12, 1976. *See* pp. 13-15 & n.13, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The relevant portions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208-1311 (hereinafter the "Multiemployer Act"), appear at 29 U.S.C. §§ 1306, 1307, and 1381-1405 (1982). The provisions challenged by appellants are printed in the Trustees' Jurisdictional Statement at pages 4-5.

STATEMENT

These consolidated appeals present a facial challenge under the Taking Clause of the Fifth Amendment to certain provisions of the Multiemployer Act—the so-called "withdrawal liability" provisions—that obligate certain employers that withdraw from multiemployer pension plans to pay their proportionate shares of the plans' unfunded vested benefits. 29 U.S.C. §§ 1381-1405 (1982).[1] Last year, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709 (1984), this Court unanimously held that retroactive application of these provisions did not violate the Due Process Clause of the Fifth Amendment. The Court in *Gray* "assume[d] . . . that the prospective effects of the Act satisfy constitutional standards." *Id.* at 2717 n.7. The three-judge court in this case unanimously held that they did, and, as this Court noted in *Gray*, every court of appeals that has considered the question has agreed.[2] The appellants now

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[1] A multiemployer plan is defined as a plan to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which satisfies such other requirements as the Secretary of Labor may prescribe by regulation. 29 U.S.C. § 1301(a)(3) (1982). Approximately two thousand such plans provide pension coverage to eight million American workers and their families.

[2] Since this Court's decision in *Gray*, the Court has denied certiorari in four cases in which courts of appeals rejected challenges to the constitutionality of the Multiemployer Act's prospective operation. *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984); *Republic Industries, Inc. v. Teamsters Joint Council*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied*, 104 S. Ct. 3554 (1984); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985). The Act's prospective operation has also been upheld in *Keith Fulton & Sons v. New England*

urge this Court to overrule those decisions and hold that on their face the withdrawal liability provisions of the Multiemployer Act violate the Fifth Amendment guarantee that "private property [shall not] be taken for public use, without just compensation."

A. Congress Acts to Protect Employees' Pension Benefits.

In 1974 Congress enacted ERISA to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of private pension plans, ERISA established a system of pension benefit insurance. Substantial public concern had been expressed over tragedies suffered by thousands of American workers, whose expectations of receiving promised pensions had been shattered by the insufficient funding of their pension plans. *See, e.g.*, 1 Legislative History of the Employee Retirement Income Security Act of 1974 (1976) 212-214 (Sen. Bentsen). As a result, a "principal purpose[] of this 'comprehensive and reticulated statute' was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans . . . . Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it.'" *Gray*, 104 S. Ct. at 2713 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62, 374-75 (1980)).

Teamsters, 762 F.2d 1124 (1st Cir. 1984), *modified on other grounds*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Terson Co. v. Bakery Drivers & Salesmen Local 194*, 739 F.2d 118 (3d Cir. 1984); and *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984). In *Peick*, *Republic Industries*, *Thompson*, *Keith Fulton*, and *Terson*, the Taking Clause claim raised by these appeals was directly at issue.

To achieve this goal of protecting "anticipated retirement benefits," Congress created appellee Pension Benefit Guaranty Corporation ("PBGC"), a wholly-owned government corporation, to administer a program of insurance for participants in both single-employer and multiemployer pension plans. 29 U.S.C. § 1302(a) (1976). For single-employer plans, ERISA immediately obligated the PBGC to pay the statutorily guaranteed benefits whenever a covered plan terminated. *Id.* §§ 1361, 1381. To finance the single-employer insurance program, the PBGC was authorized to collect premiums from all covered plans. *Id.* § 1306. It was also required to collect any shortfall from any employer that terminated a plan, up to 30 percent of the employer's net worth. *Id.* § 1362(b).

With respect to multiemployer plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978. Until that date, Congress vested the PBGC with discretionary authority to pay benefits upon the termination of multiemployer pension plans. *Id.* § 1381(c)(2)-(4). As with single-employer plans, all contributors to covered multiemployer plans were assessed insurance premiums payable to the PBGC. *Id.* § 1306(a)(3)(B). If, upon a plan termination, the PBGC exercised its discretion to pay benefits, all employers that had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional to their shares of the plan's contributions during that period, subject to the 30 percent limitation. *Id.* § 1364.

Thus, after the enactment of ERISA in 1974, employers were on notice that if they withdrew from an underfunded multiemployer plan they had a contingent liability which depended upon whether the plan survived the next five years and on whether the PBGC assumed discretionary responsibility to pay the plan's guaranteed benefits. *See Gray*, 104 S. Ct. at 2713.

B. Congress Scrutinizes the Multiemployer Pension Benefit Insurance Program.

During the years between 1974, when ERISA was passed, and 1978, when mandatory multiemployer guarantees were due to go into effect, several multiemployer plans terminated, and the PBGC extended coverage to thousands of participants. "Congress became concerned that a significant number of plans were experiencing extreme financial hardship," *Gray*, 104 S. Ct. at 2713-14, and that implementation of mandatory guarantees for multiemployer plans might induce several large multiemployer plans to terminate, subjecting the insurance system to a liability that would have "an adverse impact on the entire private pension system." 123 Cong. Rec. S18637 (daily ed. Nov. 3, 1977) (Sen. Bentsen); *see also* 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (Sen. Javits).

As a result, Congress acted to delay the effective date for the mandatory guarantees for 18 months, Pub. L. No. 95-214, 91 Stat. 1501 (Dec. 19, 1977), and it directed the PBGC to prepare a comprehensive report analyzing the problems of multiemployer plans and recommending solutions. *See* S. Rep. No. 95-570, 95th Cong., 1st Sess. 1-4, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4128-4131; H.R. Rep. No. 95-706 at 1 (1977). "In this way," this Court explained in *Gray*, "Congress created 'time to legislate, if necessary, before the mandatory coverage [came] into effect.'" 104 S. Ct. at 2714 (quoting 123 Cong. Rec. 36800 (1977) (Sen. Williams)).

The PBGC's report, issued on July 1, 1978, found, among other things, "that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans." *Gray*, 104 S. Ct. at 2714.[3] The "basic problem," the report found,

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[3] The inadequacy of existing law was dramatically demonstrated by the report's finding that about ten percent of all multiemployer

was the threat to the solvency and stability of multiemployer plans caused by employer withdrawals, which existing law actually encouraged. *Id.*; PBGC Study at 4, 24, 49, 51-52, 96-97; *House Labor Hearings* at 1158, 1178, 1203, 1205-06, 1248-49.[4] As the PBGC's Executive Director explained (*Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 2d Sess. 22 (1978) (*"1978 Hearings"*)):

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of

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plans, covering 1.3 million participants, were experiencing financial difficulties that could result in plan terminations before 1988. Pension Benefit Guaranty Corporation—Multiemployer Study required by P.L. 95-214—July 1, 1978 (hereinafter "PBGC Study") at 1, 138; *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess. 1155, 1290 (1980) (*"House Labor Hearings"*). Funding of all plan benefits under these plans, if they terminated, would cost the insurance system approximately 4.8 billion dollars and necessitate an increase in premiums to unacceptable levels. PBGC Study at 2, 16, 139; *House Labor Hearings* at 1156, 1170, 1291. The House Education and Labor Committee concluded that "the corporation's report clearly demonstrates that . . . the magnitude of the risk and the potential exposure of the system are intolerably high." H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 57 (*"House Labor Report"*), *reprinted in* 1980 U.S. Code Cong. & Ad. News 2952.

[4] Even ERISA's limitation of an employer's liability to 30 percent of its "net worth," 29 U.S.C. § 1362(b)(2) (1976), was found to be an incentive for employers to terminate their plans rather than to continue funding them. *See* PBGC Study 51; *House Labor Hearings* 1205; 126 Cong. Rec. S11668 (daily ed. Aug. 26, 1980) (Sen. Javits); *cf.* Report to the Congress by the Comptroller General of the United States, *Legislative Changes Needed to Financially Strengthen Single Employer Pension Plan Insurance Program*, GAO/HRD-84-5 (*"Single-Employer Report"*) 42-44 (Nov. 14, 1983) (Appendix to this Brief ("App.") 2a-5a) (30 percent net-worth limitation enables employers to "take advantage of" the single-employer insurance system).

> employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

To remedy or at least alleviate the problems caused by employer withdrawals, the PBGC proposed that withdrawing employers be required to complete funding their shares of the plans' unfunded vested liabilities. PBGC Study at 97-114; *House Labor Hearings* at 1249-66. Again, the PBGC's Executive Director explained (*1978 Hearings* at 23):

> To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. . . .
>
> We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan.

The PBGC's proposal was included in policy recommendations submitted to Congress in early 1979 and incorporated in proposed legislation sent by the White House to Congress a few months later. 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (Sen. Javits); S. 1076, 96th Cong., 1st Sess. (1979).

C. Congress Enacts the Multiemployer Act.

Congress scrutinized and debated the issue of withdrawal liability for the next 17 months. Four congressional committees held hearings on the Administration's bill, and many witnesses testified.[5] Four times Congress deferred the effective date for the commencement of mandatory insurance coverage of multiemployer plans.[6] "On each occasion," this Court has observed, *Gray*, 104 S. Ct. at 2714 n.1, "Congress was providing more time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans."

After painstaking consideration, Congress agreed that the existing law, by providing undesirable incentives for employer withdrawal and leaving plans with inadequate means for funding their existing obligations, posed a serious threat to the benefit security of multiemployer plan participants. The absence of effective withdrawal liability permitted an employer to "withdraw from a plan leaving unfunded benefit obligations for his employees

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[5] *House Labor Hearings, supra*; *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate*, 96th Cong., 1st Sess. (1979); *Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing Before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate*, 96th Cong., 2d Sess. (1980) ("*Senate Finance Hearing*"); *Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives*, 96th Cong., 1st Sess. (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearing Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. (1980).

[6] *See* Pub. L. No. 95-214, 91 Stat. 1501 (Dec. 19, 1977) (extending date through June 30, 1979); Pub. L. No. 96-24, 93 Stat. 70 (June 19, 1979) (extending to May 1, 1980); Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980) (extending to July 1, 1980); Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980) (extending to August 1, 1980).

which must be paid by the remaining employers in the plan," and encouraged a " 'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. S10100 (daily ed. July 29, 1980) (Sen. Javits).

Congress recognized that the imposition of withdrawal liability would displace certain provisions of agreements reached in collective bargaining.[7] Nevertheless, in the end, Congress decided that there was no acceptable alternative to the Multiemployer Act. A principal committee report announced:

> [T]he committee has concluded that to let the current law become mandatory or to eliminate the guarantee program would create economic havoc and do serious harm to active workers and retirees in, and employers contributing to, multiemployer plans.

House Labor Report 63-64, 1980 U.S. Code Cong. & Ad. News 2932; *see* 29 U.S.C. § 1001a(a)(4) (1982).

On May 22, 1980, the House passed its version of the bill by a vote of 374-0. 126 Cong. Rec. H4170 (daily ed.). Two months later the Senate passed its version by a vote of 85-1. 126 Cong. Rec. S10169 (daily ed. July 29, 1980). On September 26, 1980, the President signed the Multiemployer Act into law.[8]

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[7] "Multiemployer plans are creatures of collective bargaining. The [House Committee on Education and Labor] believes that the integrity of the collective bargaining process must be preserved to the utmost extent consistent with assuring the financial soundness of multiemployer plans to meet benefit commitments. The bill as reported out by the committee represents an effort to strike an appropriate balance among conflicting interests and needs." *House Labor Report* 63; 1980 U.S. Code Cong. & Ad. News 2931.

[8] The Act as originally enacted contained a retroactive effective date of April 29, 1980, which this Court held constitutional in *Gray*. On July 18, 1984, the President signed into law the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. Section 558(a) of that Act changes the effective date of the Multiemployer Act's withdrawal liability provisions to September 26, 1980, the date of its initial enactment.

D. Withdrawal Liability Is the Cornerstone of a Complex and Integrated Statute.

Withdrawal liability is the most important element in Congress' 1980 statutory plan to protect and strengthen multiemployer pension plans. The concept is straightforward. As *Gray* explains, 104 S. Ct. at 2715, withdrawal liability under the Act

> requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets.

As intended by Congress, withdrawal liability removes incentives for employers to withdraw from plans facing actual or potential financial difficulties; it assures new employers contemplating entry into a multiemployer plan that they will not be assuming vast obligations incurred by the plan prior to their entry; and it ensures that the withdrawing employer will, in effect, continue to fund a share of the plan obligations incurred during its association with the plan, rather than shift those obligations to the remaining employers or to the PBGC.[9] Withdrawal

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[9] Because of the unfairness of the previous system, under which withdrawing employers could shift their funding responsibilities to remaining employers, several employer associations testified in support of withdrawal liability. *See, e.g., Senate Finance Hearing* 155 (National Construction Employers Council); *id.* 215 (Food Marketing Institute); *id.* 281 (Bituminous Coal Operators Association). And contrary to the position they take in this Court, amicus National Association of Manufacturers ("NAM") supported a House rule whose purpose was to facilitate the passage of the Multiemployer Act. 126 Cong. Rec. H7864 (daily ed. Aug. 26, 1980) (Rep. Thompson). *See also* Pension Rep. (BNA) A-22 (Mar. 21, 1980) (App. 6a). Amicus American Trucking Associations ("ATA") similarly participated in the legislative process that led to the enactment of the Multiemployer Act, and initially appeared satisfied with its efforts: "The Senate Finance Committee last week

liability thus promotes plan continuation, protects new plan entrants, and secures the insurance system.

However, withdrawal liability is only one facet of a delicately structured statute that seeks "to strike an appropriate balance among conflicting interests and needs." *House Labor Report* 63, 1980 U.S. Code Cong. & Ad. News 2931. Congress tempered imposition of withdrawal liability with numerous provisions moderating its impact on withdrawing employers [10] and imposed other burdens on plan participants, remaining employers, and PBGC premium payers.[11] As one court aptly noted, "Con-

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completed markup of the ERISA Multi-Employer Plans Amendments Act, S. 1076. The changes we [the ATA] had sought in the bill were adopted, with some modifications." *Truck Line* No. 32, at 1 (June 16, 1980) (App. 7a).

[10] *See* pp. 32-36, *infra*.

[11] In addition to withdrawal liability, the Multiemployer Act effects the following major changes in ERISA:

(a) The PBGC is required to guarantee the payment of certain pension benefits, but at a level below that guaranteed for terminations prior to the enactment of the Multiemployer Act. 29 U.S.C. §§ 1322a, 1322b. The reduction of guaranteed benefits to levels below what a plan has promised to pay acts as an incentive for employees and their bargaining representatives to ensure that the plan is funded and administered in a manner that would provide full benefits, rather than to rely on plan termination and the PBGC guarantee.

(b) The PBGC is authorized to provide financial assistance to multiemployer plans which are unable to meet their current financial obligations to pay guaranteed benefits. This provision permits a plan which is experiencing financial difficulty to continue, rather than be compelled to terminate or to demand excessive contributions from remaining employers. It therefore allows employers to continue making reasonable contributions to an insolvent plan, without incurring liability under ERISA. *Id.* § 1431.

(c) Plan sponsors are authorized to contain costs by reducing benefits in certain circumstances, and sponsors of insolvent plans are required to suspend benefit payments when funds are not

gress thus spread the pain around." *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1052 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984).

E. The Proceedings Below.

The procedural history of this case predates passage of the Multiemployer Act. On June 17, 1975, the appellant Trustees filed this suit, seeking injunctive relief and a declaratory judgment that the pension plan in this case is a "defined contribution plan" within the meaning of ERISA and thus is not subject to the coverage or authority of the PBGC.[12] Alternatively, the Trustees contended, if the plan was subject to the provisions of ERISA requiring premium payments and imposing contingent termination liability, ERISA on its face was unconstitutional because it deprived the Trustees, the employers, and the plan participants of their "just and lawful property without due process of law and without just and adequate compensation." J. App. 7-8.

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available. (However, benefits may not be suspended or reduced below the guaranteed level.) *Id.* §§ 1425, 1426.

(d) The benefits provided by multiemployer plans are to be funded over a shorter period of time. More realistic funding of a plan's commitments protects the insurance system as well as participant interests and controls the exposure of contributing employers. 26 U.S.C. § 412; 29 U.S.C. § 1082.

(e) The annual per capita premium paid by covered multiemployer plans was raised from $.50 to $1.40. Further increases are scheduled to raise the premium to $2.60 over a nine-year period. *Id.* § 1306.

[12] A "defined contribution plan" is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

The district court agreed that the Trust was a "defined contribution plan" and enjoined the PBGC from treating it otherwise. J. App. 42, 51-52. The Ninth Circuit reversed and remanded for consideration of the constitutional issues. *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir.), *cert. denied*, 440 U.S. 935 (1978). On remand, the Trustees moved to convene a three-judge court to hear the constitutional claims. The district court, however, concluded that the Trustees' constitutional challenges were "insubstantial" and denied the motion. J. App. 55-56. The Trustees petitioned for a writ of mandamus on the issue, but their petition was denied by both the Ninth Circuit and this Court. *Connolly v. Williams*, No. 79-7580 (9th Cir., Jan. 14, 1980); *Connolly v. United States District Court*, 445 U.S. 959 (1980).

On the merits, the district court granted summary judgment to the PBGC. J. App. 60. On appeal, however, the Ninth Circuit could not agree that the constitutional claims were so "insubstantial" that a three-judge court could be summarily denied. The case was remanded with directions to convene a three-judge court. *Connolly v. Pension Benefit Guaranty Corp.*, 673 F.2d 1110, 1114 (9th Cir. 1982).

By this time, however, the Multiemployer Act had superseded the provisions of ERISA governing multiemployer plans. Consequently, on July 26, 1982, the Trustees moved to amend their complaint to include a challenge to the constitutionality of the withdrawal liability and premium provisions enacted in 1980. The PBGC argued that it was anomalous to permit a constitutional challenge to a statute enacted in 1980 under the three-judge court requirement repealed in 1976, and that to do so would frustrate the congressional effort to reduce the burden on lower courts as well as this Court's mandatory docket. The PBGC therefore opposed the motion.[13] The

[13] The PBGC also challenged the filing of the amended complaint on the grounds that the Trustees, who do not pay withdrawal liabil-

district court, however, permitted the amendment. It also permitted, over the PBGC's objection, intervention in the case by four employers, including appellant Woodward, that had been assessed withdrawal liability by the Trustees. The PBGC contended that the employers were abusing the vestigial three-judge statute and that permitting them to argue the particular facts of each of their cases would greatly expand the scope of this case and impose new and unnecessary burdens on the district court and on this Court. The district court addressed this concern by granting intervention only "on the condition that [the employers] do not litigate beyond the scope of plaintiffs' First Amended Complaint." J. App. 87. The case thus remained a challenge to the statute on its face.

On May 1, 1984, the three-judge court granted summary judgment in favor of the PBGC "as to all of plaintiffs' and intervenors' facial constitutional challenges." J. App. 117. The court emphasized that "[w]e do not, however, resolve the constitutionality of the statutes as applied to particular parties." J. App. 117-118.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Multiemployer Act requires certain employers that withdraw from multiemployer plans "to compensate [the] pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal." *Gray*, 104 S. Ct. at 2720. The central issue on these appeals, as presented in the Jurisdictional Statements and briefs of both appellants, is whether this statutory imposition of liability upon employers constitutes a "taking"

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ity, lacked standing to challenge the constitutionality of its assessment, and also that 29 U.S.C. § 1451(a)(2) proscribes actions relating to withdrawal liability against the PBGC. *Cf. Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 98 n.2 (1978) (Rehnquist, J., concurring).

of private property without just compensation in violation of the Fifth Amendment.

We note first the peculiarity and inappropriateness of characterizing as a governmental "taking" a statutory allocation of monetary liability as between two private parties. The essence of legislation is the apportionment of rights and duties, including "the burdens and benefits of economic life, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), among members of organized society. Legislation that makes *A* liable to *B* for consequences of *A*'s conduct has never been thought to implicate the Taking Clause. The constitutional validity of such legislation depends only on the rationality of the legislative judgment that *A* should bear the actual or estimated loss resulting from his conduct. *Id.*

Even if the statutory withdrawal liability provisions are tested under the standards applied by this Court in recent Taking Clause decisions, they easily pass constitutional muster. The character of the governmental action involved in this case is wholly unlike the "physical invasion" that is the hallmark of a governmental "taking" by eminent domain. All that the Multiemployer Act does is authorize a private party (a pension plan) to make a monetary claim against another private party (an employer) because of the potential harm that the former may suffer as a result of the latter's act of withdrawal. Nor has any significant "economic impact" of the statute been shown here. In view of the fact that these appeals present a purely facial challenge to the Act, it is impossible for appellants to argue that the Act regulates them "too far [so that] it will be recognized as a taking." And, in light of the enactment of ERISA in 1974 and the many months of legislative debate before the Multiemployer Act was adopted, employers who are affected if they withdraw from a pension plan *after* enactment of the law cannot seriously argue that they have been unfairly deprived of "reasonable investment-backed expectations."

Consequently, whether one judges an employer's withdrawal liability in light of the three distinct factors enunciated in this Court's recent decisions, or whether one undertakes an "ad hoc, factual inquiry" to determine whether regulation has gone "too far" to be characterized as anything other than a taking, the result is the same: The liability provisions of the Multiemployer Act do not violate the Taking Clause of the Fifth Amendment.

Nor is the Due Process Clause infringed by the remedy Congress selected to deal with the problem of the shattered expectations of American workers whose pension plans had insufficient assets to pay vested benefits. To ensure that the solvency and stability of multiemployer plans would not be jeopardized by employer withdrawals, Congress empowered plan trustees to assess withdrawing employers their fair shares of a plan's unfunded benefit obligations. The reason for imposing such liability and the means chosen by Congress to effectuate that purpose amply satisfy constitutional standards.

ARGUMENT

I. CONGRESS IS NOT "TAKING" PRIVATE PROPERTY FOR PUBLIC USE WHEN IT CONFERS UPON A PRIVATE PARTY A LEGAL RIGHT TO COLLECT A MONEY JUDGMENT FOR HARM CAUSED OR RISK CREATED BY THE CONDUCT OF ANOTHER PRIVATE PARTY.

The principal statutory provision at issue makes certain withdrawing employers liable to multiemployer pension plans for their allocable shares of the plans' unfunded vested benefits. Congress has merely established a legal right for one private party (the pension plan) to recover from a second private party (the employer) for the estimated amount of the potential harm (inability to pay vested benefits) caused by the second party's act (withdrawal).

It is unusual, to say the least, for such a statutory provision to be challenged under the Taking Clause of the

Fifth Amendment. Legislation routinely defines rights and privileges of private parties in an organized society. Laws grant rights to some individuals and correlatively assign duties or liabilities to others. If a legislature declares that coal mine operators are to be absolutely liable for coal workers' pneumoconiosis, 30 U.S.C. § 901 *et seq.*, or if it imposes treble-damage liability for business acts in restraint of trade, § 15 U.S.C. § 15, the legislature is authorizing a court to take money from one private party and give it to another. This is the common stuff of legislation "adjusting the benefits and burdens of economic life" (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)), and it has never been thought that government is obliged, under the Taking Clause, to repay from the public treasury the party who bears newly created statutory liabilities.[14]

The appellants' Taking Clause claim is not strengthened by the fact that, prior to the imposition of withdrawal liability, their relationship was governed by a private contractual obligation, under which specified

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[14] We agree with the appellants that no Tucker Act remedy is available to them. Congress clearly stated its intention that no public funds be expended in support of the guarantee program: "It is hereby declared to be the policy of this Act . . . to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans." 29 U.S.C. § 1001a(c)(4). Moreover, it would be irrational for Congress to impose withdrawal liability on employers and then permit them, under the Tucker Act, to sue the United States to recover any money they may be required to pay. The prospect of such recovery would remove the disincentive for withdrawals that the Act was designed to achieve.

Nor can an employer that continues to contribute to a pension plan collect under the Tucker Act for any asserted reduction in the value of its business as a result of the enactment of the Multiemployer Act. "Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense." *California State Automobile Association Inter-Insurance Bureau v. Maloney*, 341 U.S. 105, 111 (1951).

pension-plan payments were made pursuant to a collective-bargaining agreement. All private contracts are, of course, subject to governing law.[15] An agreement that restrains trade, for example, is not shielded from the effects of a new antitrust law that renders it illegal. *Northern Securities Co. v. United States*, 193 U.S. 197, 332 (1904). Similarly, an agreement between an employer and its employees prescribing wages is not immune from the effects of a new minimum-wage provision. *United States v. Darby*, 312 U.S. 100 (1941). In such cases courts have not viewed the pre-existing contract limitation as having been "taken" for "public use" within the meaning of the Fifth or Fourteenth Amendments. *See, e.g., Bowles v. Willingham*, 321 U.S. 503, 517 (1944); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-10 (1923); *Block v. Hirsh*, 256 U.S. 135, 155-56 (1921).

Nor is Congress' public purpose in generally protecting the stability of pension funds a ground for characterizing its legislation as a "taking" of private property for "public use."[16] Legislatures always act in the per-

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[15] The Court said in *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935):

> [C]ontracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

[16] The Act's obvious public purpose is sufficient, however, to defeat the Trustees' suggestion (Br. at 30-33) that the Act takes property for "private use" and is thus unconstitutional regardless of whether just compensation is paid. As this Court stated in *Berman v. Parker*, 348 U.S. 26, 33 (1954) (emphasis supplied): "Once the *object* is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Accord, e.g., Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2879 (1984); *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2329 (1984).

ceived public interest. If consumers are benefitted at the expense of manufacturers, or employees at the expense of employers, individual private parties gain what others must give up. While the "public" may gain from such statutorily mandated transfers, they are surely not a "taking" of private property for "public use." If the appellants' reasoning were accepted, *all* legislation that had an adverse financial impact on private parties would be subject to the limitations of the Taking Clause.

In short, the creation of a statutory right in one party to recover a money judgment against another is not a governmental "taking" within the meaning of the Fifth Amendment. Cases in this Court that have considered how far governmental regulation of private property may go without being deemed a "taking" for constitutional purposes are plainly distinguishable from the present case. The law that appellants are challenging does not limit or regulate any specific property or property interest.[17] Instead, the law defines how two private parties are to allocate the financial consequences of the severance of their relationship. Prior to the enactment of the Multiemployer Act, a withdrawing employer could shift to the plan's remaining employers the financial obligation to fund all of the plan's vested benefits. After the Act took effect, the withdrawing employer became obliged to pay its fair share of any potential underfunding. Such a proper and equitable allocation of the responsibility for funding pension benefits is not subject to challenge under the Taking Clause.

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[17] The Court has suggested that rights in "specific property" may be entitled to protection under the Taking Clause even when the contract right under which they are alleged to have vested is not. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589-90 (1935). *But cf. Helvering v. Griffiths*, 318 U.S. 371, 400-01 & n.52 (1943). *See also United States v. Security Industrial Bank*, 459 U.S. 70, 77 (1982).

II. THE MULTIEMPLOYER ACT'S WITHDRAWAL LIABILITY PROVISION SATISFIES THE THREE-FACTOR TEST ESTABLISHED BY THIS COURT'S RECENT TAKING CLAUSE DECISIONS.

Even under the three-part constitutional test applied by this Court in its recent Taking Clause cases, the Multiemployer Act is constitutional. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124, this Court explained the factors that have been viewed as significant in Taking Clause determinations (citations omitted):

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

This "three-factor" test was repeated in subsequent rulings of this Court. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). In *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984), this Court observed unanimously that its prior decisions had "identified several factors that should be taken into account when determining whether a government action has gone beyond 'regulation' and effects a 'taking'":

> Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."

A. The Withdrawal Liability Provision Is Not a "Physical Invasion by Government."

In appraising the "character" of the government's action, this Court has distinguished between a law or regulation that is part of a "public program adjusting the benefits and burdens of economic life to promote the common good" and a governmental interference with property that "can be characterized as a physical invasion." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. The employer liability provision of the Multiemployer Act is plainly the former. No identifiable property belonging to an employer is invaded by the government as a consequence of the Act. The monetary liability imposed by the law leaves the employer free to select any assets it wishes to satisfy the statutory obligation. Indeed, an employer may avoid the statutory obligation altogether by not withdrawing from the pension plan.[18]

Moreover, this Court specifically noted in its *Penn Central* opinion that governmental action that merely "adjust[s] the benefits and burdens of economic life to promote the common good" is the kind of regulation that would not ordinarily be subject to the Taking Clause. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980). And in *Gray*, 104 S. Ct. at 2717-18, this Court analogized the Multiemployer Act to the Black Lung Benefits Act of 1972, acknowledging that both were statutes "adjusting the burdens and benefits of

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[18] Justice Holmes' observation in *Noble State Bank v. Haskell*, 219 U.S. 575, 580 (1911), seems pertinent to the question of whether there is any taking here:

> [T]here is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on.

By contrast, the employer here can usually avoid withdrawal liability by taking a far less drastic step—simply renouncing its inchoate business decision to withdraw from the plan.

economic life." Thus the "character" of the Multiemployer Act removes it from the category of those ordinarily subject to the Taking Clause.

B. The "Economic Impact" of Withdrawal Liability Is Uncertain.

The second of the Court's enumerated considerations is "the economic impact of the regulation." Generally, this factor involves the degree to which the private party subject to government regulation is deprived of the use of the property being taken. Thus, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83-84 (1980), the Court held that permitting free expression on a privately owned shopping center does not so significantly deprive the owners of the use or economic value of their property as to constitute a "taking."

An employer is, to be sure, completely deprived of whatever amount of money it is ultimately obliged to pay pursuant to the statutory liability. But the "economic impact" of the regulation is conditioned on a determination that there *is* liability,[19] and it is ameliorated by various moderating provisions of the Act. As discussed *infra* at pp. 32-36, Congress carefully included

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[19] Appellant Woodward, for example, may not have any withdrawal liability at all. See PBGC's Motion to Affirm, p. 6, n.6. Until the arbitrator determines, under 29 U.S.C. § 1401, whether there is liability, it is premature to consider any claim that property has been "taken," and any constitutional decision based on alleged "economic impact" would occur "in the rarefied atmosphere of a debating society." *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982). *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297; *see also Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2878 (1984); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108, 3121-22 (1985). Appellants' challenge to the Multiemployer Act on its face must, therefore, be denied, even if, in particular circumstances, an employer might be able to establish that in its case the Act had a significant "economic impact."

a number of moderating provisions that are specifically designed to reduce the "economic impact" of the Multiemployer Act on withdrawing employers. Rather than amounting to a "taking" of property, the economic impact of the Multiemployer Act on withdrawing employers is a " 'consequential incidence' of a valid regulatory measure." *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

C. The Withdrawal Liability Provision Does Not Interfere with "Reasonable Investment-Backed Expectations."

This appeal concerns only *prospective* withdrawal liability. The constitutional issue is whether an employer that withdraws from a pension plan *after* the enactment date of the Multiemployer Act may claim that its property has been "taken" when statutory liability is assessed against it. This Court's decided cases make it plain that in these circumstances there has been no interference with any "reasonable expectation" that resulted in an investment in the appellants' "property." [20]

The employer that withdraws after the enactment date of the Multiemployer Act knows that a consequence of its withdrawal is assessment of statutory liability. The published law provides sufficient notice of what will happen in the future that any "expectation" to the contrary is patently unreasonable. This proposition is established in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2875-2876 (1984), where this Court held that submission of an application for pesticide registration after the effective date of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") gave implied consent to the

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[20] It is particularly difficult for appellant Trustees to identify any reasonable investment-backed expectations that have been displaced by the imposition of withdrawal liability. On the contrary, the Act is designed to protect the assets and financial stability of the Trust.

disclosure of trade-secret data pursuant to the Act. Although the Court recognized that the secrecy of the data was a constitutionally protected property interest,[21] it refused to treat it as a compensable "taking" of "private property" under the Fifth Amendment. The disclosure, as incident to potential federal registration, was treated as one of the burdens of living "in a civilized community." 104 S. Ct. at 2875.

It does not avail appellants to argue in this case that investments may reasonably have been made before the adoption of the Multiemployer Act. Monsanto made investments in the research and development of its pesticides before FIFRA was enacted. Nonetheless, the crucial date as of which this Court evaluated the property owner's "expectations" was the date on which the data was submitted to the government agency.[22] By the same token, the reasonableness of any "investment-backed expectations" must be judged as of the date of an employer's withdrawal.

Appellants' argument that employer withdrawals may be involuntary, or may be attributable to circumstances beyond an employer's control, is equally misplaced. See Woodward Br., p. 19; Trustees Br., p. 16, n.6. There are no such facts before the Court in this case. And in

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[21] No such constitutionally protected property interest is present in the case at bar. See *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1274-76 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984), and n. 17, *supra*.

[22] The Court treated data submitted between 1972 and 1978 differently because the government had promised confidentiality for trade-secret information filed with it in those years. 104 S. Ct. at 2877-78. Retroactive disclosure of data is analogous to imposition of withdrawal liability for a withdrawal that took place before adoption of the Multiemployer Act. In *Gray*, 104 S. Ct. 2709 (1984), this Court upheld the constitutionality of limited retroactivity, applicable as of a date during the legislative consideration of the Act.

any event, the particular reasons for any specific employer's withdrawal are not grounds for finding the entire withdrawal liability program invalid on its face, as appellants request. Moreover, Congress could reasonably have concluded that the difficulties of distinguishing between voluntary and assertedly involuntary withdrawals warranted across-the-board treatment of all employers that severed their relationship with a pension plan.[23] But for withdrawal liability, employers that remain in the plan would have to fund the pensions of the withdrawing employer's employees, regardless of whether the withdrawal was "voluntary."

Finally, we note that any alleged "expectation" must be moderated by the fact that ever since ERISA was adopted in 1974, multiemployer pension plans had been the subject of intense study and probable further legislation. Appellant Woodward knew for at least six years before 1980 that it might well be held responsible for an allocable portion of the pension plan's benefit commitments. As this Court noted in *Gray*, 104 S. Ct. at 2719, "[n]ot only did ERISA itself impose contingent liability on withdrawing employers, but the various legislative proposals debated by Congress before enactment" of the Multiemployer Act gave employers "ample notice" of the withdrawal liability that was to come. This Court has stated in a slightly different, but analogous, context: "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end. . . . Invocation of the Due Process Clause to protect the rights

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[23] It is by no means clear which withdrawals are entirely beyond an employer's control. For example, in the context of employee decertification of a bargaining representative, employer complicity, coercion, or intimidation is not unknown. *See, e.g., L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1346 (9th Cir. 1980); *NLRB v. Triumph Curing Center*, 571 F.2d 462, 475-76 (9th Cir. 1978); *NLRB v. Deutsch Co.*, 445 F.2d 902, 906 (9th Cir. 1971); *cf. NLRB v. Gissell Packing Co.*, 395 U.S. 575, 580 n.1 (1969).

asserted here would make the ghost of *Lochner v. New York*, 198 U.S. 45, walk again." *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 91 (1958) (citations omitted). Similarly, the Taking Clause should not be invoked to revive "the ghost of *Lochner*."

III. WITHDRAWAL LIABILITY IS NOT A "TAKING" OF PRIVATE PROPERTY UNDER ANY OTHER STANDARD APPLIED IN THIS COURT'S TAKING CLAUSE DECISIONS.

The Court has acknowledged that there is no " 'set formula' for determining when 'injustice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. Consequently, the Court has said that the constitutional decision under the Taking Clause turns on "ad hoc, factual inquiries" into the unique circumstances of each situation. *Id.; see also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The governing rationale behind the Taking Clause was articulated in *Armstrong v. United States*, 364 U.S. at 49, and its application to this case demonstrates why the Fifth Amendment's protection is inapplicable here:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Congress could reasonably have concluded that it is not fair to place the burden of funding potential shortfalls in a multiemployer pension plan on the public as a whole." It is fair to place the burden on the employers that have benefitted from the years of labor in which their employees have engaged. And it is particularly fair to say

to an employer that severs its relationship with a pension plan whose vested benefits are insufficiently funded that it must pay a fair allocable share of that threatened shortfall.

This is not, in other words, a situation in which a benefit to the general public is being exacted at the expense of individuals who "happen to lie in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). Nor is it a case in which injuries caused by public action "remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. Withdrawing employers are an entirely suitable group to be required to share with remaining employers the financial responsibility for potential shortfalls that could disappoint employee expectations.

Nor is this a case in which governmental regulation "goes too far" and is, on that account, "recognized as a taking." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). If the withdrawal liability provision is to be deemed a form of "regulation," it is precisely suited to its purpose—to insure stability in employee pension plans.[24] In light of ample proof before Congress that employer withdrawals jeopardized the solvency of pension plans, Congress properly made withdrawing employers liable for a share of the plan's potential underfunding. The right being claimed in this case by withdrawing employers—to avoid immediate liability for potential underfunding—was correctly described by the district court in *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1044 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554

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[24] A recent survey by the General Accounting Office confirms that withdrawal liability "increases the pension security of participants in poorly funded plans." Report to the Congress by the Comptroller General of the United States, *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, GAO/HRD-85-16 (*"Liabilities Report"*) 17 (Mar. 14, 1985) (App. 9a).

(1984), as "the right to unleash forces that are disruptive of benefit security."

IV. WITHDRAWAL LIABILITY SATISFIES THE FIFTH AMENDMENT'S DUE PROCESS STANDARD.

We turn, finally, to the more traditional question in cases involving socioeconomic legislation that adjusts "the benefits and burdens of economic life"—Does the statute meet the standards of the Due Process Clause? It is plain, we submit, that Congress was confronted with a serious economic problem and chose a reasonable solution when it adopted the Multiemployer Act in 1980.

A. The Threat of Pension Plan Insolvency Was a Critical National Problem.

Congress found that frustration of multiemployer pension benefit expectations was a national problem subjecting disappointed participants to the "terrible cycle of poverty and desperation which may be their fate if they are shortchanged on pension benefits." 126 Cong. Rec. H7908 (daily ed. Aug. 26, 1980) (Rep. Pepper). Congress also found that employer withdrawals from multiemployer plans threatened not only the plans themselves, but also the future of labor-management relations. 29 U.S.C. § 1001a. Indeed, uncertainty over pension benefit payments was believed to have been a substantial factor in the nationwide coal strike of 1978, whose impact could have affected the nation's ability to "end [its] dangerous reliance upon foreign fuel sources." 126 Cong. Rec. S10105 (daily ed. July 29, 1980) (Sen. Randolph). Congress therefore decided that multiemployer pension benefit security was a problem which could not be left to solution in the private sector.

B. Congress Carefully Weighed Alternative Solutions.

Congress' initial approach, enacted in ERISA in 1974, was an insurance program providing guarantees to be

paid by the Pension Benefit Guaranty Corporation upon termination of covered plans. But Congress soon learned that termination insurance for multiemployer plans amounted to treating the patient only after he had become incapacitated. Careful study of multiemployer plans between 1974 and 1980 revealed that the most serious threat to a multiemployer plan was repeated employer withdrawals from the plan. Thus, even if the plan did not terminate, multiple withdrawals could weaken it and render it unstable. Withdrawals unfairly shifted to remaining employers the responsibility for funding the pension entitlements earned by the employees of the withdrawn employer, precipitating new withdrawals and further threatening plan viability. The legislative solution enacted in 1980 was to impose on certain withdrawing employers a liability that would counteract the incentives to withdraw from their plans, and would financially cushion such plans against the loss of the withdrawing employers' contributions when withdrawals did occur.

Amici argue that withdrawal liability is unnecessary because "the vast majority of multiemployer plans are financially sound." Brief of Amicus NAM, p. 9. They argue that an individual employer's continuing participation in a multiemployer plan is not needed to satisfy the expectations of participants. This argument ignores the most basic congressional conclusion—that without the enactment of the Multiemployer Act and especially without its withdrawal liability provisions, many multiemployer plans will fail in the future.

To be sure, a single employer's withdrawal may have little observable impact on a plan's financial health. But Congress acted to forestall the cumulative harm resulting from numerous withdrawals. This Court found that the concern that such harm might occur even during the limited pre-enactment period was "eminently rational." *Gray*, 104 S. Ct. at 2719.

Nor was Congress constitutionally required to attempt to impose withdrawal liability only for plans that meet a "needs" test. As the Ninth Circuit described Congress' decision:

> [D]etermination of whether a plan is financially sound is a difficult calculation at best, and Congress had no obligation to deny relief to the funds until they unambiguously approached insolvency.

Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985). Congress also recognized that regardless of the test used to measure financial difficulty, any attempt to impose withdrawal liability only where a plan is determined to be in financial difficulty would create the same problem Congress had identified with respect to the termination-insurance provisions of ERISA—it would encourage employers to withdraw from plans prior to the point at which liability would be assessed.

Congress carefully considered the available alternatives to imposition of withdrawal liability. *See House Labor Report* 222, U.S. Code Cong. & Ad. News 2987 (separate views). In view of the "economic havoc" that it found would accompany renunciation of benefit guarantees, Congress acted rationally in attempting to ensure, in part through withdrawal liability, that participants' expectations were fulfilled.

Nor was Congress constitutionally obliged to distinguish between voluntary and involuntary withdrawals. Congress believed that employers had sufficient control over the act of withdrawal that the prospect of withdrawal liability would, in many cases, induce them to continue contributing to their plans. And, as we have previously noted (pp. 25-26 & n.23, *supra*), the line between voluntary and involuntary withdrawals is often indistinct.

Even in the case of a truly "involuntary" withdrawal, the employer has benefitted from its association with a

multiemployer pension plan which now lacks sufficient assets to meet its vested liabilities. Withdrawal liability is designed to ensure that the employer carry its share of the burden of closing such deficits. Any rule according special treatment to purportedly involuntary withdrawals would also encourage employers to withdraw in the hope that their withdrawals would be viewed as "involuntary." Such a result would undermine the deterrent effect of withdrawal liability which Congress sought to achieve, and would unfairly shift funding responsibilities to the remaining employers.[25]

C. Congress Inserted Ameliorating Provisions.

The Multiemployer Act was not adopted until it had been reviewed and modified by four legislative committees, whose deliberations benefitted from extensive private sector participation. Congress responded to the suggestions of private parties by enacting numerous provisions to moderate the impact of withdrawal liability and to reduce its burdens to the minimum amount necessary to effect the statutory purpose. Sections 4203, 4204, 4207, 4208, 4209, 4210, 4217, 4218, 4219, 4224, and 4225 of ERISA, 29 U.S.C. §§ 1383, 1384, 1387, 1388, 1389, 1390, 1397, 1398, 1399, 1404, and 1405, are all part of Con-

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[25] Congress was hardly insensitive to the issue of "involuntary" employer withdrawal. Section 412(a)(1)(B) of the Multiemployer Act, 29 U.S.C. § 1306 note, calls for a study of "union-mandated withdrawals" to determine whether special rules governing such occasions are appropriate. Pending the adoption of any such rules, however, the Multiemployer Act treats involuntary and voluntary withdrawals alike because, as one district court has stated:

> From the perspective of the remaining employers in the plan and of the employees who expect to receive benefits from the plan, the voluntariness of one employer's withdrawal is irrelevant. What they are concerned with is there being sufficient funds to meet the obligations of the plan.

Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp. 523, 526 (W.D. Wash. 1982).

gress' effort to limit the application and impact of withdrawal liability. Indeed, much of the complexity of the Multiemployer Act is attributable to Congress' concern that appropriate moderating provisions should be included.

(1) *Transactions Not Classified as Withdrawals*— Congress exempted from the employer liability requirement a number of transactions that are not to be characterized as "withdrawals":

> (a) Special definitions apply in determining whether there has been a complete or partial withdrawal from a pension plan in the building and construction industry or in the entertainment industry. 29 U.S.C. §§ 1383(b), 1383(c), 1388(d)(1), 1388(d)(2). A somewhat different set of rules applies in connection with plans which receive substantially all of their contributions from employers primarily engaged in the trucking industry. *Id.* § 1383(d).
>
> (b) If certain conditions designed to protect the plan are met, a cessation or reduction of covered operations or contribution obligations as a result of a sale of an employer's assets will not result in a withdrawal. *Id.* § 1384.
>
> (c) A withdrawal does not occur solely because an employer has ceased to exist because of a change in corporate structure or a change to an unincorporated form of business enterprise, so long as the successor continues to contribute to the plan. *Id.* § 1398(1).
>
> (d) A withdrawal does not occur solely because an employer suspends contributions under the plan during a labor dispute involving its employees. *Id.* § 1398(2).

Each of these provisions evidences a congressional attempt "to impose liability only to the extent necessary to achieve the legislative purpose." *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1268 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984). Moreover, as au-

thorized by the Act, the PBGC has promulgated a final rule regarding the procedures to be followed by plans in other industries that wish to narrow the definition of "withdrawal." 29 C.F.R. Part 2645 (1982).

(2) *Reductions in Withdrawal Liability*—Congress mitigated the size of the financial liability in various instances:

> (a) The amount of unfunded vested benefits allocable to an employer is reduced in accordance with the *de minimis* rule of 29 U.S.C. § 1389(a). One effect of this provision is to eliminate withdrawal liability entirely for an employer whose obligation would be equal to or less than the smaller of (1) ¾ of 1 percent of the plan's unfunded vested obligations, or (2) $50,000. Plans may, by amendment, increase this latter limit to as much as $100,000. *Id.* § 1389(b). The principal purpose of this "significant moderating feature," *Peick*, 539 F. Supp. at 1050, is to reduce the burden of withdrawal liability on small employers. *See* 126 Cong. Rec. S10100 (daily ed., July 29, 1980) (Sen. Javits). According to a recently published congressional study, a great majority of withdrawing employers benefit from the existence of this provision. *Liabilities Report, supra* note 24, at 42 (App. 9a-10a).
>
> (b) If an employer liquidates its business, its withdrawal liability will ordinarily be limited to a percentage of the employer's liquidation value. 29 U.S.C. § 1405(a)(1). Alternatively, the liability may be the amount of the plan's unfunded vested benefits attributable to employees of the employer. *Id.* § 1405(a)(2). However, this latter alternative entails a determination which may be extremely difficult if not impossible, few plans appear to have attempted it, and consequently the employer's liability is ordinarily limited to the percentage of liquidation value determined under the schedule of mar-

ginal rates. PBGC Opinion Letter 82-8, March 25, 1982 (App. 12a).[26]

(c) Withdrawal liability is not due in a lump sum, but is instead payable over time—usually the period necessary to amortize the employer's withdrawal liability at a payment level based on the employer's pre-withdrawal contribution history. 29 U.S.C. § 1399(c)(1). If that period exceeds 20 years, the employer's liability is limited to the first 20 annual payments. *Id.* § 1399(c)(1)(B).

(d) Subject to certain conditions, a plan may be amended to provide that a new employer may with-

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[26] In view of this provision, amicus ATA completely misses the mark with its argument that withdrawal liability takes property by forcing employers to remain in business against their will. Section 1405(a) permits an employer to liquidate its business and retain a substantial percentage of the proceeds. No employer that forgoes this option and continues to operate a losing business should be heard to argue that it is being forced to remain in business against its will. The Multiemployer Act does not require that it do so, and thus the *Brooks-Scanlon* line of cases relied on by the ATA are totally inapposite.

Appellants and amici also attack the Multiemployer Act because it does not contain a net worth limitation on withdrawal liability identical to the 30 percent limitation on termination liability originally available under ERISA. However, Congress found this limitation to be a serious flaw in ERISA, since it provided an incentive to terminate in order to shift liabilities onto the PBGC. *See* PBGC Study 51, *House Labor Hearings* 1205; 126 Cong. Rec. S11668 (daily ed. Aug. 26, 1980) (Sen. Javits). Indeed, the PBGC has found the 30 percent limit to be a major source of abuse in the single-employer program and has recommended that the limit be eliminated. The reason is that an employer's "net worth" may not "prove to be an adequate gauge of its ability to meet pension obligations," *Single-Employer Report, supra* note 4, at 44 (Nov. 14, 1983) (App. 4a). For instance, Woodward states that Roy L. Klema Engineers, Inc., was assessed withdrawal liability in an amount "seven times its net worth." However, Klema's withdrawal liability payments would have been a small fraction of the amounts of discretionary distributions Klema has made to its shareholders. Declaration of Robert M. Klein in Opposition to Motion for Summary Judgment (Docket Item No. 177) at 7-10.

draw without liability if the employer had an obligation to contribute for no more than six consecutive plan years or, if shorter, the number of years required for vesting under the plan. *Id.* § 1390. This "free look" provision is intended to encourage new employers to join multiemployer plans without the immediate risk of incurring withdrawal liability.

(e) Plans may adopt rules for other terms under which employer withdrawal liability may be discharged. *Id.* § 1404.

(3) *Post-Withdrawal Conduct*—The Multiemployer Act established abatement rules which reduce or eliminate an employer's withdrawal liability if certain events occur *after* the employer's withdrawal. These rules are extremely complex, particularly as they apply to partial withdrawal liability. In general, however, withdrawal liability may be abated if an employer (1) resumes covered operations after a complete withdrawal or (2) increases its contribution base units after a partial withdrawal. 29 U.S.C. §§ 1387, 1388.

The complex interaction of withdrawal liability and its moderating provisions reflect a congressional responsiveness to the extensive private-sector effort which contributed to the passage of the Multiemployer Act. The Multiemployer Act was a carefully crafted congressional response to a broad spectrum of labor, industry, and governmental concerns. As the Seventh Circuit has observed: "The various moderating features of the [Multiemployer Act], such as exclusions from the definition of withdrawal, the partial exemption of certain industries and the *de minimis* exemptions, indicate that Congress attempted to impose the burdens of the legislation only to the extent necessary to achieve its legislative objective." *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d at 1268.

D. Congress Rationally Balanced the Relevant Considerations.

Congress reasonably concluded that employer withdrawals from multiemployer plans imposed burdens on (1) the remaining employers through increased funding obligations and increased potential liability in the event of plan termination, (2) premium payers through the increased likelihood of plan terminations resulting in losses to the insurance system, and (3) participants through the prospect of diminished benefits if plans were forced to terminate. Under these circumstances, the imposition of liability on withdrawing employers as well was justified as a rational measure to spread the costs of employees' pensions "to those who have profited from the fruits of their labor." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). The court below, and all the courts that have considered the issue, have concluded that where vested pension benefit expectations are threatened, Congress acts reasonably if it requires those expectations to be fulfilled and directs employers who have benefitted from reliance on those expectations to fund them, even if that necessitates modification of bargained-for employer expectations. "We see no disabling inequity in imposing withdrawal liability on employers when the pension plans they have joined voluntarily turn out to be underfunded." *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d at 1273.

Appellants and amici argue that it is inequitable to impose liability on withdrawing employers. Amicus ATA attributes to Congress "a large measure of responsibility for the problem to which the [Multiemployer Act] was directed—financially troubled and unstable multiemployer plans." ATA Brief, p. 9. According to the ATA, Congress "restricted the ability of multiemployer plans to respond to financial difficulties" by removing their ability to "defer funding, restrict vesting or reduce benefits." *Id.* & n.17.

Congress, of course, had determined that precisely those practices were the cause of the frustration of benefit expectations that ERISA was adopted to counteract. 29 U.S.C. § 1001(a), (c). The ATA is therefore either expressing a difference of opinion with Congress' policy decision that pension security is a proper matter for national legislative treatment, or questioning Congress' fact-finding. But such factual and policy determinations are both for Congress, and not for this Court.

Appellant Woodward and the amici also allege that underfunding results from the trustees' excessive benefit promises, and that employers are divorced from any responsibility by the fund's "sole control" over the management of the plan and its authority to set benefit levels. In the first place, most multiemployer plans, including the Trust whose Trustees are appellants here, permit amendment by collective bargaining. See Trust, Article XI, Section 1 (1960) (Docket Item No. 9, Exhibit A) (App. 15a). See also *id.*, Article IX, Section 1. Thus, employers could have negotiated limits on trustees' benefit commitments.[27] They have had six years' notice—between the enactment of ERISA and the enactment of the Multiemployer Act—that they might become obligated to fulfill those commitments. Having chosen to enjoy the

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[27] We note also that in many trucking industry plans the connection between the benefits received by participants and the level of contributions negotiated by their employers is quite clear to the employers, the union, and the participants. For example, until recently, the Central States, Southeast and Southwest Areas Pension Fund had a schedule of "benefit classes" which expressly related benefit levels to contribution levels. The term "benefit classes" has been changed to "contribution classes," but the change in terminology did not change the underlying reality—the schedule still explicitly relates benefits to contribution levels. Thus, although the trustees initially establish the benefits within a given benefit class or contribution class, and have authority to modify those benefits, participants' reliance on a particular level of benefits is based in large measure on the contribution rate negotiated by their employer.

rewards of the trustees' pension promises, employers may not now insist that they have no responsibility for ensuring that the promises are kept.

Moreover, it is by no means clear that employers' interests are ignored by plan trustees. As one court has stated: "Actual consideration of [employer] interests is . . . likely, given management's statutory right to select half of the trustees." *Peick*, 539 F. Supp. at 1048.[28] Furthermore, a recent government study and policy statements by employer associations reveal that employers can and do affect benefit decisions, as Congress anticipated they would.[29]

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[28] The court in *Keith Fulton* stated its view that, contrary to the argument advanced here, "[e]mployer-appointed trustees do not violate their fiduciary duties simply because they are sensitive to the management perspective of what is best for the plan." 762 F.2d at 1142 n.5 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 343 (1981) (Stevens, J. dissenting)). The *Keith Fulton* court went on to state that "[t]he majority holding in *Amax* is not to the contrary." *Id.* Indeed, the funds involved in *Amax* also demonstrate the ability of bargaining parties to limit trustee discretion. See Brief of the Trustees of United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae In Support of Appellee at 3, 7-8. In those plans, benefits and eligibility requirements are specified in the collective bargaining agreement, and the trustees "are obligated to enforce these determinations unless modification is required to comply with applicable federal law." *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-74 (1982).

[29] See Report to the Congress by the Comptroller General of the United States, *Effects of the 1980 Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits*, GAO-HRD-85-58 at 16 (June 14, 1985) (App. 17a): "[o]fficials at . . . 10 [of 51 surveyed] plans said that employers were generally more reluctant to negotiate benefit improvements because higher plan costs could result in higher employer withdrawal liability." See also *id.* at 17 (App. 18a). Additionally, the Associated General Contractors of America, one of the employer associations that negotiated the collective bargaining agreement adopted by Woodward, urges that "[c]ontractors involved with plans which are less well-funded should work to improve funding either at the bargaining table or through the plan trustees." Inventory of Construction Industry Multiem-

Finally, Section 412 of the Internal Revenue Code, 26 U.S.C. § 412, imposed specific funding requirements that effectively limit trustee discretion to increase benefit levels. The Multiemployer Act strengthened those funding requirements, further limiting such discretion.

In any event, Congress refrained from placing the entire burden of plan underfunding on withdrawing employers. On the contrary, withdrawal liability was only one feature of a comprehensive revision of the law governing multiemployer plans. Funding rules were tightened so that employers contributing to ongoing plans have to make minimum payments higher than under the 1974 law. 26 U.S.C. § 412(b)(2)(B). Premiums were increased. 29 U.S.C. § 1306(a)(3)(A)(ii). PBGC funds were made available to supplement employer-derived assets so that insolvent plans can continue operating, though with reduced benefit payments. *Id.* §§ 1431, 1425, 1426. Participants' benefits were made subject to limited reductions in plans suffering substantial financial difficulties, *id.*, and the ultimate protection of benefit payments, the PBGC's guarantee, was reduced. *Id.* §§ 1322a, 1322b. In short, Congress "spread the pain around." *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. at 1052.

Evaluating another provision of this same Act, this Court said in *Gray*, 104 S. Ct. at 2717-18: "[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Accord,*

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ployer Pension Plans (February 1983), p. 6 (App. 21a). The AGC notes that "management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding." *Id.*, p. 3. Indeed, Senator Dole had observed that the Multiemployer Act could result in increased direct bargaining over multiemployer plan benefits. 126 Cong. Rec. S10103 (daily ed. July 29, 1980).

PruneYard Shopping Center v. Robins, 447 U.S. at 85: "[T]he law shall not be unreasonable, arbitrary or capricious, and . . . the means selected shall have a real and substantial relation to the objective sought to be attained" (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)). As we have demonstrated, the Multiemployer Act rationally adjusts the benefits and burdens of economic life in a manner that is not arbitrary and is reasonably suited to carry out its statutory objective. Consequently, it satisfies the requirements of both the Due Process and Taking Clauses of the Fifth Amendment.[30]

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[30] The Trustees contend at the close of their brief that ERISA's requirement that the Pension Trust pay premiums to support the Act's termination and insolvency insurance programs must be struck down both because it is "inseverable" from the allegedly unconstitutional withdrawal liability provisions and also because the discretionary authority accorded the PBGC under the 1974 Act violated the constitutional separation-of-powers principle. Neither of these contentions has the slightest merit. With respect to "inseverability," ERISA has contained the following provision (29 U.S.C. § 1139) from the outset:

> If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

As this Court declared in *INS v. Chadha*, 462 U.S. 919, 932 (1983), this provision "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether [a particular provision] was invalid." As was the case in *Chadha*, nothing in the legislative history of ERISA or its amendments justifies abrogation of that presumption.

The Trustees' argument that the discretionary authority granted the PBGC between 1974 and 1980 violated the principle of separation of powers is also far-fetched. Congress delineated a "clear, intelligible principle," *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928), to guide the PBGC in the exercise of its discretionary authority under former 29 U.S.C. § 1381(c)(2) (1976) (now 29 U.S.C. § 1461(c)(2)). That section stated that the PBGC is to pay benefits if it determines "that the payment by [the PBGC] of benefits guaranteed under [Title IV of ERISA]

with respect to that plan will not jeopardize the payments the [PBGC] anticipates it may be required to make in connection with [the mandatory guarantee program]." Congress legislated discretionary rather than mandatory coverage for multiemployer plans prior to 1980 because it needed "time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans." *Gray*, 104 S. Ct. at 2714 n.1. In these circumstances, the delegation of discretionary authority was a reasonable means of achieving congressional aims and it "must be judged according to common sense and the inherent necessities of governmental coordination." *J.W. Hampton*, 276 U.S. at 406. Under former 29 U.S.C. § 1381(c)(1) (1976), the PBGC was required to "notify the Committee on Education and the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate" whenever it exercised its discretionary authority. However, the constitutional scheme of separation of powers does not require a "hermetic sealing-off of the three branches of government from one another." *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment). The requirement that Congress be notified is simply one of those "formal reporting requirements . . . well within Congress' constitutional power." *INS v. Chadha*, 462 U.S. at 955 n.19.

CONCLUSION

For the foregoing reasons, the judgment of the district court sustaining the Multiemployer Act against constitutional challenge should be affirmed.

Respectfully submitted,

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September 1985

APPENDIX

APPENDIX

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

Legislative Changes Needed To Financially Strengthen Single Employer Pension Plan Insurance Program

The federal insurance program for single employer (sponsor) pension plans administered by the Pension Benefit Guaranty Corporation was created by the Employee Retirement Income Security Act of 1974. At the end of fiscal year 1982, the program reported a $333 million deficit because claims from terminating plans accumulated faster than they could be financed from premiums. The Corporation estimates that unless premiums are increased this deficit could increase to an estimated $938 million by fiscal year 1987.

Claims result primarily from bankrupt sponsors who are unable to continue funding pension plans. However, other circumstances also contribute to the increasing deficit: (1) full insurance coverage is generally provided for benefits granted retroactively for past service that have received limited sponsor funding; (2) minimum plan contributions by sponsors are deferred with Internal Revenue Service approval and remain unpaid upon plan termination; and (3) authority to recover unfunded pension liability for plans from sponsors is limited.

This report contains recommendations to the Congress to financially strengthen the program.

GAO/HRD-84-5
NOVEMBER 14, 1983

* * * *

[42] CHAPTER 5

PBGC AUTHORITY LIMITED IN RECOVERING UNFUNDED LIABILITY FROM TERMINATING PLAN SPONSORS

ERISA employer liability provisions limit PBGC recovery of unfunded pension obligations from sponsors terminating pension plans. During the first 7 years of operation, the insurance program incurred $397 million in claims for underfunded plans, of which it expected to recover an estimated $60 million of employer liability. Pension obligations not recovered from sponsors of terminating plans are funded from premiums paid to the program by ongoing plans.

When a plan terminates, the plan's sponsor is obligated by ERISA to finance any deficiency in plan assets needed to meet the insurance program's guarantee levels up to a limit equal to 30 percent of the sponsor's net worth—the difference between the value of business assets and liabilities accumulated at a point in time. Such liability provisions were expected to deter solvent sponsors from terminating underfunded plans and produce a reasonable, although limited, recovery of liability from insolvent sponsors. These objectives are not being met because most sponsors do not have a positive net worth or their net worth is low in relation to the level of unfunded guaranteed benefits in terminated plans.

Our review of 38 pension plan terminations by 25 sponsors (which included 8 ongoing and 17 in bankruptcy or business liquidation) showed that PBGC's recovery from the terminating plans' sponsors was limited because:

—Thirty percent of their net worth was not sufficient to pay the unfunded pension plan liability for seven sponsors that continued in business after terminating plans.

—Contingent liabilities were not established against six companies that divested portions of their businesses, including underfunded pension plans terminated later by insolvent sponsors.

—Six insolvent sponsors' assets were distributed to unsecured creditors, but PBGC recovered little or none of its claim, which was limited by the sponsor's net worth.

[43] LIMITATIONS ON RECOVERY OF EMPLOYER LIABILITY FROM ONGOING SPONSORS

The insurance program is absorbing large plan insufficiencies when ongoing plan sponsors voluntarily terminate insufficient plans. PBGC absorbs the pension liabilities of these plans without significant recovery of employer liability when the sponsor terminates a deficient plan at a time when business net worth is low and PBGC has little or no financial basis under ERISA to recover employer liability.

Almost one-third of terminated pension plans trusteed or expected to be trusteed by the insurance program as of September 30, 1981, were sponsored by employers who continued in business while avoiding about $17 million in liabilities for plan asset insufficiencies (see table 3, p. 11). While this sponsor group has the highest employer liability collection rate, it is questionable whether the program should act as a financial relief mechanism for solvent sponsors to avoid the consequence of pension plan underfunding.

The Congress and authorities in the pension community have raised concerns that other ongoing businesses in financial distress seeking relief from pension liabilities they have created could take advantage of ERISA provisions and terminate pension plans when company net worth is low. PBGC has identified 34 major firms with large unfunded pension liabilities that are under financial

pressure. Should these companies terminate their plans, PBGC estimates they could generate claims of about $4.4 billion against the insurance program.

Eight of the sponsors in our review terminated pension plans and were still in business in 1982. About $12.8 million of plan asset insufficiencies totaling $26.3 million was expected to be collected from seven sponsors (PBGC's evaluation of one sponsor's net worth was not completed at the time of our review). The following examples illustrate ways in which ERISA's 30-percent net worth limitation prevented PBGC from recovering additional unfunded liabilities.

—A sporting goods manufacturer experienced net losses of $2.8 million and $4 million in 1976 and 1977, respectively. Citing adverse financial conditions, the company terminated two pension plans in December 1977. The plans were insufficient by about $1.8 million. Because the company's net worth was $200,000 at the time it terminated the plans, PBGC expected to collect only $60,000 in employer liability. An August 1982 Dun & Bradstreet, Inc., report showed that, despite the depressed economy, the company's sales increased and an operating profit of [44] $145,000 after taxes was realized in 1980. Hence, this employer's net worth did not prove to be an adequate gauge of its ability to meet pension obligations.

—A mattress manufacturer adopted a pension plan for its hourly employees in 1950 and one for its salaried employees in 1960. The company, after suffering losses of about $3.9 million during fiscal years 1973-76 and reporting a net worth of $50,000 as of March 1976, terminated its salaried plan in 1976 and its hourly plan in 1978. The 1976 termination resulted in a claim of $596,941 on the insurance program and a collection of $15,000 in employer liability. The 1978 termination resulted

in a claim of $512,432, and PBGC expects that employer liability will be low. A September 1982 Dun & Bradstreet report showed the company continuing in business with estimated annual sales of about $8 million compared to about $4.4 million in 1978. Despite its financial distress, the company established a successor plan for its hourly employees which provided defined benefits covered by PBGC's insurance program, including past service benefits for the same employees extending back to the years covered by the terminated insufficient plan.

When an ongoing sponsor terminates its plan(s), there are other negative implications for the insurance program and for plan participants. Plan participants must accept guaranteed benefit levels that are often reduced by ERISA benefit ceilings in lieu of the plan's higher benefit levels. The added requirements for benefit payment administration associated with participants in the plans that ongoing sponsors terminate increase insurance program costs paid by all plans.

* * * *

284 BNA PENSION REPORTER A-22 (March 31, 1980)

* * * *

The only other rollcall vote during the markup was over an amendment proposed by Rep. Richard T. Schulze (R-Pa.) which would have put a 3 percent per year reduction on the guarantee for subsidized early retirement benefits.

The amendment was opposed by the coalition of labor and employer groups that support the legislation. [PBGC Executive Director Robert E.] Nagle indicated that the coalition includes the National Coordinating Committee for Multiemployer Plans, National Construction Employers Conference, Food Marketing Institute, United Food and Commercial Workers, Western Conference of Teamsters, ERISA Industry Committee, National Association of Manufacturers, and others.

Nagle opposed the amendment on the ground that it would create a disparity in guarantees between the single employer and multiemployer programs. The amendment was defeated by a vote of 21-12.

from—

Bennett C. Whitlock, Jr., President
American Trucking Associations
1616 P Street, N.W., Washington, D.C. 20036

No. 32
June 16, 1980

TRUCK LINE

ERISA AMENDMENT BILL CLEARS SENATE FINANCE COMMITTEE

The Senate Finance Committee last week completed markup of the ERISA Multi-Employer Plans Amendments Act, S. 1076. The changes we had sought in the bill were adopted, with some modifications.

The bill provides that an employer who totally or partially withdraws from a union multi-employer pension plan is liable for a share of the plan's unfunded vested obligations. But it contains an exemption, which we had sought, that would allow employers to withdraw without liability from plans in which the contribution base remains stable. In order to get this amendment, we agreed that the withdrawing employer would post a bond that could be cancelled after five years if the plan's contribution base did not substantially decline. Under this provision, which was supported by Sen. David Durenberger (R-Minn), the Pension Benefit Guaranty Corporation, which insures the pension funds, will be the judge of whether the contribution base has been damaged by a withdrawal. . . .

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

3/14/85

Effects Of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans

The most controversial changes the Multiemployer Pension Plan Amendments Act of 1980 made to the Employee Retirement Income Security Act of 1974 concerned the liability imposed on employers withdrawing from multiemployer defined benefit pension plans. Under the amendments a withdrawing employer must generally continue payments to the plan for its share of the plan's unfunded vested benefits, which are the value of nonforfeitable benefits under the plan less the value of the plan's assets.

GAO believes that the liability imposed on withdrawing employers increases the pension security of participants in poorly funded plans. It also provides an additional measure of protection for the Pension Benefit Guaranty Corporation's insurance fund established by the 1974 act to guarantee plan benefits. However, changes can be incorporated to make application of withdrawal liability more effective and equitable. Toward that end, this report proposes two amendments to the withdrawal liability provisions for the Congress to consider.

GAO/HRD-85-16
MARCH 14, 1985

[17]

CONCLUSIONS

Many multi-employer plans are well funded. However, many of the 8.3 million participants in multiemployer defined benefit pension plans are in plans which are not well funded. The 24 plans in our sample, which were less than 50 percent funded for vested benefits, have over 950,000 participants. Labor, in its November 19, 1984, study of multiemployer pension plans, found that 15 percent of all multiemployer plans were less than 50 percent funded and that such plans tended to be much larger in size than average, covering 29 percent of all participants.

MPPAA provides increased financial protection for multiemployer plans to the extent that the withdrawal liability provisions (1) discourage employers from withdrawing from plans and (2) result in the collection of a part or all of a withdrawing employer's allocated share of a plan's unfunded actuarial liability. This in turn increases the pension security of participants in poorly funded plans. It also provides a measure of protection against insolvency of the PBGC multiemployer insurance program by reducing the contingent liability against the program resulting from the billions of dollars in unfunded vested liabilities of poorly funded plans.

* * * *

[42] EFFECT OF DE MINIMIS ON WITHDRAWING EMPLOYERS

Analysis of 2,868 withdrawals from plans with unfunded vested benefits and required to apply the de minimis rule disclosed that about 87 percent of withdrawing employers had either no liability or a reduced liability.

Effect on employers	*Number of withdrawing employers*	*Percent of total*
Liability eliminated	2,024	70.6
Liability reduced	464	16.2
No change to liability	380	13.2
Total	2,868	100.0

Relief provided the 2,488 employers amounted to $36.1 million, or 65 percent of their total liabilities before de minimis offsets. The remaining 380 employers received no de minimis reduction from their $213 million in liabilities.

PBGC OPINION LETTER 82-8 (March 25, 1982)

Dear ————————:

This responds to your letter in which you requested our opinion as to the meaning of "the unfunded vested benefits attributable to employees of the employer" as used in Section 4225(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended by* the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). Specifically, you are concerned about interpretations to the effect that this amount is the same as determined under Section 4211 of ERISA to be "the amount of the unfunded vested benefit allocable to an employer . . . ." We conclude that the two amounts are not the same.

Section 4202 of ERISA requires, upon the withdrawal of an employer that the plan sponsor "determine the amount of the employer's withdrawal liability." Section 4201(b) of ERISA defines withdrawal liability as "the amount determined under Section 4211 to be the allocable amount of unfunded vested benefits, *adjusted* . . . in accordance with Section 4225." [Emphasis added.]

Section 4225(a) of ERISA provides a limitation on the withdrawal liability of an employer whose withdrawal from a multiemployer plan resulted from a "bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party." In this circumstance the employer's liability is limited to the greater of: (1) "a portion . . . of the liquidation or dissolution value of the employer" determined in accordance with a schedule of marginal rates ranging from 30% to 80% (Section 4225(a)(1)(A), (a)(2)); or (2) "the unfunded vested benefits attributable to employees of the employer." (Section 4225(a)(1)(B)).

The plain language of the statute makes it clear that "the unfunded vested benefits attributable to employees of the

employer" under Section 4225(a)(1)(B) is not identical to the amount of the unfunded vested benefits allocable to an employer under Section 4211. For example, even the "direct attribution" allocation method under Section 4211(c)(4) allocates to the employer a share of unfunded vested benefits which are not attributable to employees of the employer. Moreover, if the two amounts were identical, Section 4225(a) would be meaningless—it would never reduce liability below the amount allocated to the employer under Section 4211.

If the plan sponsor does not or cannot make the determination required under Section 4225(a)(1)(B), the employer's liability is limited to the amount determined in accordance with the schedule provided in Section 4225(a)(2). In any event, the plan sponsor is obligated to apply Section 4225(a), where appropriate. The failure to do so would be inconsistent with Title IV of ERISA, and would be reversible in the dispute resolution process under the Multiemployer Act.

I hope this adequately responds to your question. If you have further questions on this matter, please contact ———— of my staff at the above address or at ——.

Sincerely,

/s/ Henry Rose
HENRY ROSE
General Counsel

[Docket Item No. 9]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,
Defendant.

STIPULATION RE MOTION FOR SUMMARY JUDGMENT

IT IS HEREBY STIPULATED by and between the plaintiffs and defendant, each through its respective counsel, as follows:

* * * *

[Exhibit A to Stipulation]

AGREEMENT ESTABLISHING THE OPERATING ENGINEERS PENSION TRUST

THIS AGREEMENT made and entered into in the County of Los Angeles, State of California, this 13th day of December, 1960, by and between ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SOUTHERN CALIFORNIA CHAPTER; BUILDING CONTRACTORS ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING AND GRADING CONTRACTORS ASSOCIATION, INC.; HOME BUILDERS ASSOCIATION OF LOS ANGELES, ORANGE AND VENTURA COUNTIES, successor to Home Builders Institute, Inc.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER; SAN DIEGO BUILDING CONTRACTORS ASSOCIATION; ENGINEERING AND GRADING CONTRACTORS ASSOCIATION, INC., SAN DIEGO CHAPTER; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, NEVADA CHAPTER; LAS VEGAS BUILDERS EXCHANGE; SOUTHERN NEVADA HOME BUILDERS, INC.; and FEDERATED EMPLOYERS OF NEVADA, INC., (hereinafter called "Employers"), and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12 (hereinafter called "Union"), recites and provides as follows:

RECITALS

1. WHEREAS, the Employers and the Union are parties to Collective Bargaining Agreements which provide that each contractor covered by such agreements will make contributions to a Joint Pension Trust with respect to each hour worked (or paid) each employee covered by any of such agreements and employed by such contractor; and . . .

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING AND OF THE MUTUAL PROMISES HEREINAFTER PROVIDED, the parties agree as follows: . . .

ARTICLE IX
GENERAL PROVISIONS

Section 1. Subject to the provisions of the Collective Bargaining Agreements, the rights and duties of all parties, including the Employers, the Signatory Associations, the Individual Employers, the Union, the Employees, Retired Employees and their beneficiaries, and the Trustees, shall be governed by the provisions of this Trust Agreement and the Pension Plan and any insurance policies or contracts procured or executed pursuant to this Trust Agreement.

. . . .

ARTICLE XI
AMENDMENT AND TERMINATION

Section 1. The provisions of this Trust Agreement may be amended or modified at any time, and from time to time, by mutual agreement of the Employers and the Union subject to the terms and conditions of the Collective Bargaining Agreements, any applicable law or regulation and the provision of Section 4 of this Article.

. . . .

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

Effects Of The 1980 Multiemployer Pension Plan Amendments Act On Plan Participants' Benefits

The Multiemployer Pension Plan Amendments Act of 1980 changed federal requirements for funding and insuring the benefits of over 8 million participants in multiemployer defined benefit pension plans nationwide. A major change increased employers' liability for unfunded benefits when they withdrew from the plans.

GAO found that plan terminations increased from 27 in the 6 years before the act's passage to 66 in the 4 years after. According to plan officials, the act's employer liability changes contributed to the increases, but economic and other factors played a more significant role. Plan terminations after the act affected less than 1 percent of the participants nationwide. Most of those affected are to receive all benefits earned, and alternative pension coverage was made available for most of the participants still working.

Benefit practices of most of the 139 plans GAO sampled were changed after the act. According to plan officials, the act's employer liability provisions contributed to changes causing 12 percent of the 3.2 million sample plan participants to receive either no benefit increases after the act when they had been given benefit increases before or smaller increases than previously received. However, much higher percentages of the plans' participants were similarly affected or received greater benefit increases because of changes not related to the act.

GAO/HRD-85-58
JUNE 14, 1985

[16] * * *

However, officials of 10 of the 51 plans expressed concern that MPPAA had unfavorably affected the plans' collective bargaining process even though plan changes were favorable to participants. Officials at the 10 plans said that employers were generally more reluctant to negotiate benefit improvements because higher plan costs could result in higher employer withdrawal liability. An official of one of the plans said that the collective bargaining disagreement on plan changes had to be settled in arbitration.

Officials of the 27 plans that had changes only unfavorable to plan participants cited financial and nonfinancial reasons for the changes. Financial reasons most often cited were the funded status of the plans or general economic conditions (Sept. 1980 to May 1983). Although the specific nonfinancial factors cited as reasons for plan changes were usually related to unique aspects of individual plans, they generally reflected a management desire to not continue, at least at the same rate, benefit improvements.

Officials of the 13 plans that had changes both favorable and unfavorable to participants generally attributed changes to reasons similar to those cited by officials of the 78 plans discussed above. However, the reasons cited for individual changes generally reflected the plans' competing desires to (1) improve participants' benefits and (2) minimize plan costs. For [17] example, 8 of the 13 plans had multiple changes that were favorable to one participant group, such as working participants, and unfavorable to the other (retired participants). These plans often cited financial concerns for changes affecting one group and nonfinancial reasons for changes affecting the other. The other five plans cited primarily financial concerns as the reasons for multiple changes that favorably and unfavorably affected the same participant group (working participants).

MPPAA-RELATED CHANGES ATTRIBUTED TO WITHDRAWAL LIABILITY PROVISIONS

Officials of the 24 plans affected by MPPAA said that changes were made because of concern about the effects of the act's provisions governing withdrawing employers' liability for unfunded plan benefits. Although the provisions have a greater potential impact on some plans (such as those with unfunded benefits) than others (such as fully funded plans),[2] we found that they contributed to changes in both categories of plans.

Before MPPAA, employers withdrawing from a plan were not liable for a share of unfunded vested benefits unless the plan terminated within 5 years of their withdrawal. Also, liability was limited to 30 percent of the employers' net worth. MPPAA removed the net worth limitation and made each withdrawing employer, unless covered by special rules or relief provisions, liable for its allocated portion of a plan's unfunded benefits (general withdrawal rules). The special withdrawal liability rules, which generally apply to plans in the construction and entertainment industries, exempt withdrawing employers from liability unless they continue to work in the same geographic area without an obligation to contribute to the plan.

Officials of 17 of the 24 plans told us that benefit practices, affecting 264,000 participants, were changed so that increases in the plan's unfunded benefits, and therefore employers' withdrawal liability, could be minimized. Officials of the other seven plans that were fully funded said that changes, affecting 122,136 participants, were made to avoid unfunded benefits and the resulting potential withdrawal liability for employers.

. . . .

INVENTORY

OF

CONSTRUCTION INDUSTRY

MULTIEMPLOYER PENSION PLANS

[SEAL OMITTED IN PRINTING]

Associated General Contractors of America
1957 E St. NW
Washington, D.C. 20006

[p. 1] AGC PENSION PLAN INVENTORY

February 1983

INTRODUCTION

With the enactment of the Multiemployer Pension Plan Amendments Act of 1980, it became essential that contractors be aware of, and take an active interest in, the financial health of multiemployer pension plans. The current level of unfunded vested liability (UVL) as well as the upward or downward trend of liability are particularly important pieces of information.

This need for more and better data led AGC to undertake an inventory of construction industry multiemployer pension plans. Under the guidance of the ERISA Task Force, AGC has been attempting to gather information on as many of the more than 1,000 construction industry plans (according to PBGC) as possible.

This report represents a vastly expanded version of AGC's interim report of almost 200 construction industry multiemployer pension plans that was released in July, 1982 (see Fringe Benefit Bulletin #18-82). This current report contains information on over 650 plans that contractors contribute to. While this survey does not include all of the construction industry related multiemployer plans, it does include most of the larger plans and appears to provide a fairly representative sample of construction industry multiemployer pension plans.

* * * *

[p.3]

UNFUNDED VESTED LIABILITY [UVL] (419 Plans)

Attachment A represents individual plan data on plan assets, unfunded vested liability (UVL), the ratio of plan assets to vested benefits, and yearly contributions. An analysis of the level of UVL maintained by each plan reveals a wide swing with a high of $3.57 billion to no

UVL and all variations in between. Of 419 plans providing information on the level of UVL, a surprising 204 or 48.7 percent had no UVL. This still leaves 51.3 percent of survey plans with UVL and, in many cases, potentially large employer withdrawal liability. It should be noted, however, that much of the UVL data is for 1978 or 1979. Since that time, management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding. This effort should increase the number of plans that are well-funded.

[p. 6]

* * * *

Conclusion

There are few definite conclusions that can be drawn in the aggregate from AGC's pension plan inventory effort excepting that the funding levels of plans vary widely without any apparent pattern. There can be no doubt, although more plans are better funded than we first expected, that unfunded vested liability and potential employer withdrawal liability are still a serious problem for our industry. Contractors involved with plans which are less well-funded should work to improve funding either at the bargaining table or through the plan trustees. Various options are available including an agreement to divert a portion of plan contributions to reduce UVL or an agreement to cap benefits until funding reaches a certain level. Contractors involved with well-funded or fully-funded plans should consider trust or collective bargaining agreement language perventing [sic] any slippage in the funding level. Conversion to a defined-contribution plan should also be reviewed. Defined-contribution plans specifically limit an employer's liability to his agreed-to per hour contributions and also provide significant advantages to construction workers in regards to portability and vesting.

Dan Knise

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No. 84-1555 and No. 84-1567

In the Supreme Court
OF THE
United States

October Term, 1985

JOHN L. CONNOLLY, *et al.*,
each in his respective capacity as Trustee of the
OPERATING ENGINEERS PENSION TRUST,
Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

REPLY BRIEF OF APPELLANTS CONNOLLY, ET AL.

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REPLY BRIEF OF APPELLANTS CONNOLLY, ET AL.

I.

NEITHER "RATIONALITY" NOR "FAIRNESS AND JUSTICE" IS A SUFFICIENT MEASURE OF TAKING CLAUSE PROTECTION.

The appellee Pension Benefit Guaranty Corporation ("PBGC") argues throughout its brief as if the withdrawal liability statute should be exempt from examination under the Taking Clause because the overall statutory scheme can be characterized as regulation "adjusting the benefits and burdens of economic life." In fact, PBGC is so insistent the statute be tested only under the Due Process Clause, not under the Taking Clause, that substantially all of PBGC's statement of the case and more than half of the length of PBGC's argument (PBGC Br., pp. 29-43) is devoted to the merits of a challenge under the Due Process Clause, even though no due process issue is raised in this appeal. Clearly, PBGC is more comfortable in showing that the withdrawal liability statute meets the minimal "rationality" test applicable to review of such legislation under the Due Process Clause as reflected in *P.B.G.C. v. R. A. Gray & Co.*, ____ U.S. ____, 104 S.Ct. 2709 (1984) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976), than in attempting to sustain the challenged statute under the Taking Clause.

But in rushing to the more congenial environs of the Due Process Clause, PBGC fails to explain why the statutes challenged in *Gray*, in *Turner Elkhorn* and in this case sufficiently involve a taking of property so as to require reaching the merits of a challenge under the Due Process Clause, but yet no taking of property occurs sufficient to implicate the Taking Clause. If no taking of property were present in the statutory provisions challenged in *Gray* or in *Turner Elkhorn*, then this Court would have disposed of the cases on that basis rather than by deciding on the merits that the requisite due process of law was satisfied by the statutes involved. Thus, PBGC's basic rationale contains a significant inconsistency.

Further constitutional error arises in PBGC's attempt to convince the Court that the Taking Clause affords substantially the same protection as does the Due Process Clause. Specifically, PBGC argues as if governmental regulation "goes too far" and becomes recognizable as a "taking of property" only if the challenged statute is not "precisely suited" to the overall regulatory purpose of the statutory scheme. PBGC Br., p. 28. This is a serious misreading of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922), in which Mr. Justice Holmes explained that a regulation "goes too far" when the regulation "reaches a certain magnitude, [and then] in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.*, 260 U.S. at 413, 43 S.Ct. at 159. *See, also, Williamson County v. Hamilton Bank,* ____ U.S. ____, 105 S.Ct. 3108, 3123 (1985). More recent decisions of this Court such as *Williamson County* make sufficiently clear that a regulation "goes too far" when any property is taken; when that occurs, the taking of property must satisfy the Taking Clause. *Id.*, 105 S.Ct. at 3123-24. *See, also, Penn Central, infra,* 438 U.S. at 127, 98 S.Ct. at 2661.

In a similar vein, PBGC contends that "fairness and justice" should be the essential determinant of whether government must comply with the Taking Clause (PBGC Br., p. 27), while at the same time arguing, rather incongruously, that "the Taking Clause should not be invoked to revive 'the ghost of *Lochner* [*v. New York*, 198 U.S. 45, 25 S.Ct. 539 (1905)].' " PBGC Br., p. 27. Finally, PBGC concludes:

> "[T]he Multiemployer Act rationally adjusts the benefits and burdens of economic life in a manner that is not arbitrary and is reasonably suited to carry out its objective. Consequently, it satisfies the requirements of both the Due Process and Taking Clauses of the Fifth Amendment." PBGC Br., p. 41.

What PBGC argues in substance, but states somewhat obliquely, its supporting *amicus* states in a direct and final conclusion:

> "The [Takings Clause] is satisfied if . . . the [Congress] *rationally could have believed* that [the withdrawal liability provisions] would promote [MPPAA's] objective."[1] (Emphasis in original.)

This is constitutional error of the *utmost gravity.*

The decisions of this Court certainly do not support the radical conclusions urged by PBGC.

> "[H]owever 'rational' the exercise of the [legislative] power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *U.S. v. Security Industrial Bank,* ____ U.S. ____, 103 S.Ct. 407, 410 (1982).

Moreover, this Court's consideration of "fairness and justice" in past Taking Clause decisions has been for the purpose of *preserving* Taking Clause protection, *not* to relieve the Government of the obligation to pay compensation when property has been taken. For example, in *Armstrong v. U.S.,* 364 U.S. 40, 48-49, 80 S.Ct. 1563, 1568-69 (1960), upon which PBGC relies, this Court required compensation for the "taking" of mechanic's liens on ships, despite the argument of the Government that the liens were not "taken" but merely became unenforceable under the doctrine of sovereign immunity when the Government took possession of the ships. Whenever a fundamental element of ownership of property is severed, this Court has invariably required compensation. *Cf., Kaiser Aetna v. U.S.,* 444 U.S. 164, 178-180, 100 S.Ct. 383, 392-93 (1979) ["the Government's attempt to create a public right of access to the improved pond goes so far beyond

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[1]Brief Amicus Curiae of the National Coordinating Committee, at p. 28.

ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*. . . . (W)e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation"]; and, *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 327 (1979) ["the regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . (I)t is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds"]. As in the circumstance of a physical occupation of real property, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S.Ct. 3164, 3175 (1982), when a complete destruction or transfer of ownership of property rights has been effected by government action, this Court has always required compensation and has never reasoned that a "taking" can occur without compensation in the interests of "fairness and justice."

Minimal "rationality" as applied under the Due Process Clause would furnish absolutely no real protection against majoritarian oppression of minority interests, a primary aim of the Taking Clause. *See* Connolly Br., pp. 11-14. The same can be said of "fairness and justice", since both "rationality" and "fairness" are defined ultimately within a framework of assumptions controlled by the majority. The Framers had no misconception that a "fairness machine" could be developed to furnish the protection sought, nor did the Taking Clause ultimately rely upon such an ephemeral concept. Requiring "just compensation" to be paid whenever property is taken was the Framers' expressed view of the most reliable standard for assuring protection of the interests involved.

The concepts of "rationality" and "fairness" do not adequately comprehend the concerns for preserving the liberty of all members of a free society. Conclusions

regarding "rationality" and "fairness" can be derived within the context of a particular statute based on assumptions controlled by a majority in Congress, but the Taking Clause serves a broader and more fundamental role in securing the welfare of this and future generations. Therefore, the constitutional inquiry must consider the consequences for the economic and political dynamics of this republic which are embodied in Taking Clause protection against governmentally caused forfeitures of property.

PBGC would ask only whether the governmental taking of money from employers to pay "for potential shortfalls [in pension trust assets] that could disappoint employee expectations" (PBGC Br., p. 28) is rational and fair *vis a vis* the employers and employees. This Court must answer whether empowering Congress to enact such a statute would cause intolerably high damage to the personal freedom guaranteed by the Taking Clause to the children of the employees and the employers, as well as all others protected by the Constitution. Depriving future generations of the Taking Clause guarantee that the material fruits of their labors will not be forfeited under governmental "economic regulation" would, experience shows, leave no adequate catalyst able to unleash the productive and creative energies of individuals. This highly important infringement of the personal liberty of every American would be a high price, indeed, to pay for the very marginal gain in material wealth afforded by the withdrawal liability statute to perhaps ten million participants of multiemployer pension trusts.

In this light, the Taking Clause is seen more clearly in its fundamental role, serving not merely as a protection of the *status quo* for the benefit of the present "haves" of society, but likewise protecting the aspirations of the "presently have-nots" and catalyzing the truly remarkable degree of vertical mobility achieved by individuals and families in society under our Constitution. Protection of

private rights in property as a key limitation on the power of government is undoubtedly at the center of our successful political economy, which has produced an accelerating increase in the wealth and the relative welfare of our citizenry beyond any precedence.[2] Adoption of rationality and fairness as the functional requisites for taking property by economic regulation would effectively reduce the Taking Clause to an abstraction without substance, an aimless legal force that might serve or disserve its intended purposes: to protect individuals against the tyranny of the majority; to release the productive energies of individuals for the betterment of self and society; to keep Government within recognizable limits; and to establish and hold fast to the scope of individual freedom.

II.

THE TAKING OF PROPERTY BY THE STATUTE IS NOT EXCUSED BY AN ABSENCE OF "PHYSICAL INVASION" OR BY "AMELIORATING" PROVISIONS OF THE STATUTE.

The three factors considered by the Court in determining whether a taking of property had occurred in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104,

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[2]Long before the emergence of the current post-industrial era, the unmatched success of our economic system was acknowledged even by its most antagonistic critics.

> "The bourgeoisie, during its rule of scarce 100 years, has created more massive and more colossal productive forces than have all preceding generations together. Subjection of Nature's forces to man, machinery, application of chemistry to industry and agriculture, steam-navigation, railways, electric telegraphs, clearing of whole continents for cultivation, canalization of rivers, whole populations conjured out of the ground — what earlier century had even a presentiment that such productive forces slumbered in the lap of social labor?" K. Marx & F. Engels, *The Communist Manifesto* (New York: International Publishers 1948), pp. 13-14.

98 S.Ct. 2646 (1978), are useful primarily in analyzing a statute which regulates or limits the future use of property under continuing ownership by the deprived party. This is not such a case of governmental limitations placed on continued ownership of property, since, as PBGC concedes, "[a]n employer is, to be sure, completely deprived of whatever amount of money [the employer] is ultimately obliged to pay pursuant to the statutory liability." PBGC Br., p. 23.

> "Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytic framework employed in *Penn Central Transportation Co. v. New York City* . . . and *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035 (1980) where governmental action affected some but not all of the 'bundle of rights' which comprised the 'property' in question." *U.S. v. Security Industrial Bank, supra,* 103 S.Ct. at 411.

Thus, the Court was able to perceive the elements of a "taking" of property in *Security Industrial Bank* and in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446 (1980), without need for detailed analysis of the three factors found useful in *Penn Central.*

By comparison, PBGC argues as if the three factors considered in *Penn Central* are to be used, not as tools to enhance precise understanding, but as screens intended to obfuscate direct examination of the statute. The brief of appellants Connolly, *et al.,* ("the Trustees") discusses in detail each of the three factors found useful in *Penn Central* in determining whether a taking of property had occurred (Connolly Br., pp. 15-30), but PBGC makes almost no direct response to any of the arguments presented. Instead, PBGC suggests that determining "the character of the governmental action" involves merely categorizing the general nature of the overall statutory scheme as either "economic regulation" or as a

"physical invasion," with only the latter being a taking of property. PBGC Br., pp. 22-23.[3] Such a suggestion is both inaccurate and simplistic.

This Court has held that governmental action which causes a permanent physical occupation of real property invariably constitutes a taking of the property to the extent of the physical occupation. *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 458 U.S. at 434, 102 S.Ct. at 3175. However, the Court's decisions make equally clear that a physical occupation of real property is not the *only* type of governmental action for which the Taking Clause requires compensation. *Cf., U.S. v. Security Industrial Bank, supra,* and the cases discussed therein (*see* Connolly Br., p. 18), each of which involved the granting of Taking Clause protection for property in the nature of lien rights. Since lien rights do not involve present physical possession of property, no "physical invasion" by government was present in those cases.

Moreover, "physical invasion" is subject to an interpretation which would encompass governmental action taking physical possession of any property, including money. For example, the State took physical possession of money rightfully accruing to the deprived party in *Webb's Fabulous Pharmacies,* although that "taking" could scarcely qualify as a physical occupation of real property such as was involved in *Loretto.* The withdrawal liability statute involved in this case requires the deprived party to surrender physical possession of money and, if the

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[3]Attempting to support this position, PBGC argues that the statutory obligation is "monetary," does not involve "identifiable property," and should not be treated as a taking of property under the Taking Clause because *"the law leaves the employer free to select any assets it wishes to satisfy the statutory obligation."* (Emphasis added.) PBGC Br., p. 22. The Taking Clause does not tolerate this astonishing hypothesis that any governmental taking of property is excused so long as the deprived party is permitted to select the particular portion of his assets to be forfeited.

money is not paid, the statute enables a pension trust to take physical possession of whatever property, real or personal, belongs to the employer pursuant to a resulting judgment. Thus, the withdrawal liability statute ultimately results in a much more significant "physical invasion" of the property of the deprived party than occurred through the governmental action in *Loretto,* which involved occupation of minimal space on an apartment house roof for a cable television installation. *Loretto,* 458 U.S. at 422, 102 S.Ct. at 3169.

PBGC next suggests that, although the employer is "completely deprived" of money in the amount of the statutory liability, the "economic impact" is "ameliorated by various moderating provisions of the Act" (PBGC Br., p. 23), thereby presumably achieving compliance with the Taking Clause. Small wonder that PBGC made no response to the Trustees' discussion of the historical foundation of the Taking Clause. Connolly Br., pp. 10-14. The "amelioration" required by the Taking Clause for any governmental taking of property for public use is "just compensation," not mere "moderating provisions" designed to take the property as efficiently or as painlessly as is consistent with governmental objectives.

Again, the "economic impact" factor discussed in *Penn Central* is analytically useful primarily when ownership of the affected property remains in the deprived party, and some but not all of the "strands" in the "bundle" of property rights have been slashed through. In such circumstances, the Court has considered "economic impact" as a basis for finding a compensable taking even though the deprived party continues to own some or most of the bundle of property rights. But "economic impact" has never been viewed by the Court as a basis for permitting a complete taking of property to be uncompensated. Such a complete deprivation of money "has every possible element of a Fifth Amendment 'taking,' " *Armstrong v. U.S.,* 364 U.S. 40, 48, 80 S.Ct. 1563, 1568 (1960), and *Arm-*

strong runs directly contrary to PBGC's suggestion that withdrawal liability is merely a "consequential incidence" of valid regulation.

Referring to the third factor of the *Penn Central* analysis, the "reasonable investment-backed expectations" of the deprived party, PBGC argues essentially that a statute may take property without compensation at any time after its effective date because the "published law provide[s] sufficient notice of what will happen in the future [so] that any 'expectation' to the contrary is patently unreasonable." PBGC Br., p. 24. If this were true, the property owner in *Webb's Fabulous Pharmacies* could have been required to forfeit the interest earned on the funds deposited with the government, because the statute requiring the forfeiture existed when the owner chose to deposit the funds. *See,* 449 U.S. at 160-161, 101 S.Ct. at 450-451. This Court held to the contrary, ruling that a statute "may not transform private property into public property without compensation . . . [since] [t]his is the very kind of thing that the Taking Clause . . . was meant to prevent." *Id.,* 449 U.S. at 164, 101 S.Ct. at 452. By contrast, PBGC's proposition would permit any statute to take property without compensation at any time after its effective date, which certainly finds no support in this Court's decision in *Ruckelshaus v. Monsanto Co.,* ____ U.S. ____, 104 S.Ct. 2862 (1984).

Essential to the reasoning in *Ruckelshaus* was the provision that only the trade secret property Monsanto voluntarily chose to submit after the 1978 effective date of the amended statute was subject to subsequent use for public purposes. *Id.,* 104 S.Ct. at 2875. At the same time, the Court held that trade secret property submitted to the EPA between 1972 and 1978, prior to the effective date of the amended statute, could not be subjected to public use under the amended statute without just compensation for the property taken. *Id.,* 104 S.Ct. at 2877-79.

Rather than faithfully applying this rationale to permit the property owner to decide after the effective date of the statute whether to engage in the regulated conduct, PBGC and the withdrawal liability statute would require the employer to forfeit property merely because the employer declines to engage in the regulated conduct after the effective date of the statute. Applying such a distorted rationale in *Ruckelshaus* would have required Monsanto to forfeit the trade secret property filed with the EPA between 1972 and 1978 if Monsanto failed to submit additional trade secret property for registration after the 1978 enactment of the amended statute. In fact, the position of the employer under the withdrawal liability statute is even worse, because whether a "withdrawal" occurs is neither voluntary nor subject to the unilateral control of the employer. *See* Connolly Br., p. 16.

Finally, PBGC returns to its contention that the 1974 enactment of "contingent liability" gave "ample notice" of withdrawal liability. PBGC Br., p. 26. No acknowledgment is made of the showing in the Trustees' brief (Connolly Br., pp. 25-26) that the 1974 statute actually entrapped participating employers at that time by making them liable for a forfeiture of property if they withdrew in sufficient numbers to cause termination of the pension plan. PBGC's argument is, in essence, that a statutory taking of property can evade the Taking Clause if, after the initial statutory enactment and before a final adjudication on the merits, the statute is amended to accomplish the taking of property under modified provisions.

III.

WITHDRAWAL LIABILITY, LIKE A TAX, IS A TAKING OF PROPERTY, BUT ONE WHICH MUST COMPLY FULLY WITH THE TAKING CLAUSE.

A second *amicus* supporting PBGC contends that a statutory requirement that a person pay money is not "a

'taking' of his 'property,' within the meaning of the Takings Clause . . ., otherwise, government could not even raise revenue through taxation." UMW Trustees' Br., p. 14. Clearly, such is not the case. Every tax is a taking of property,[4] but one which occurs under the express power of taxation granted to Congress under Article I, § 8, of the Constitution. This Court construes the various provisions of the Constitution in a manner which best achieves the full intent of each provision and "is not self-destructive . . ., [so] that the powers which [the Constitution] confers on the one hand it does not immediately take away on the other . . ." *Billings v. U.S.*, 232 U.S. 261, 282, 34 S.Ct. 421, 424 (1914). *See, also, Brushaber v. Union Pacific*, 240 U.S. 1, 24-25, 36 S.Ct. 236, 244 (1916) [indicating the potential for invalidation of a tax law as a "taking" in violation of the Fifth Amendment if the taxing power is abused so badly as to be "not the exertion of taxation but a confiscation of property"]; *Steward Machine Co. v. Davis*, 301 U.S. 548, 585, 57 S.Ct. 883, 890 (1937) ["discrimination (in taxation), if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment"]; and *Marchetti v. U.S.*, 390 U.S. 39, 58, 88 S.Ct. 697, 708 (1968) ["We are equally obliged to give full effect to the constitutional restrictions which attend the exercise of (the taxing) powers"].

Of course, the legislative power to tax is not implicated in this case, since Congress did not purport to exercise the power to tax in enacting the withdrawal liability statute. "Withdrawal liability" is not called a tax, is not

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[4] "[Taxation] is not merely similar to eminent domain; it is the same, as far as the power itself goes. * * * The distinction between what we call taxation and what is called eminent domain lies, not in any differences between money and things, but between even and uneven exaction." Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 571-72 (1972).

laid and collected as a tax, and is payable to another private party rather than the Government.[5] Nevertheless, the most remarkable parallel to be drawn between a "tax" and "withdrawal liability" is that both involve a statutory rquirement that a person pay money — and who would deny that any tax law involves a governmental taking of property, albeit one that is empowered under Article I, § 8? Clearly, not being a tax, "withdrawal liability" is a governmental taking of property within the meaning of the Taking Clause.

IV.

UNLIKE REGULATORY STATUTES WHICH GOVERN ECONOMIC CONDUCT AFTER A CERTAIN EFFECTIVE DATE, THE WITHDRAWAL LIABILITY STATUTE "TAKES PROPERTY".

Given the opportunity to confront directly the Taking Clause issues presented by the Trustees' brief, PBGC instead expresses an inability to discern a constitutionally material difference between the effects of the "withdrawal liability" statute and other economic regulatory statutes, including the antitrust and minimum wage laws. PBGC Br., pp. 17-19. Of course, each of those statutes regulated conduct after its effective date and, in so doing, made persons liable in monetary damages for engaging in certain prohibited conduct after the effective date. By comparison, the challenged withdrawal liability statute requires one person (an employer) to pay money to another private party (a pension trust) if, after the statute's effective date, the employer fails to make a new

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[5] A taking of property by a private party under authority of a federal statute is no less a taking than when the Government directly takes the property. *Loretto v. Teleprompter, supra*, 458 U.S. at 432, n. 9, 102 S.Ct. at 3174.

contract with a third party (a labor organization) requiring monetary contributions to the pension trust.

The authority of Congress to regulate commerce as determined by *Northern Securities Company v. U.S.*, 193 U.S. 197, 24 S.Ct. 436 (1904) and *U.S. v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1941), and the inefficacy of "forehanded agreements" to preserve executory profits in the face of newly enacted regulation are unquestioned. *See F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 146 (1958). But the withdrawal liability statute plainly involves different considerations. The withdrawal liability statute does not merely lay down guiding rules by which all parties will be held accountable for future conduct. Payment of money is required in amounts determined by the statute, based on conduct occurring primarily before and partly after the effective date of the statute. The only "offensive" conduct occurring after this statute's effective date to trigger the forfeiture of property is the employer's exercise of a constitutionally protected liberty: to be — to exist — free of governmental compulsion to enter into any "consensual" obligations to another private party.

"Withdrawal liability" arises under the statute when the employer fails to reach a final agreement with a labor union covering wages, hours and other working conditions, and including continued participation in the affected pension trust. *See* Connolly Br., pp. 15-16. This legislative conduct — requiring a person to choose between forfeiting property and forfeiting the "natural, inherent, and inalienable" liberty to decline to enter into a private contract, 16A *C.J.S.* Constitutional Law § 491, pp. 568-69 — is fundamentally different from regulation of an executory contract, and amounts to a taking of property. A view to the contrary would empower Congress to engage in social control of the most egregious nature; *e.g.*, requiring specified classes of persons living in cities to forfeit property unless each enters into a private

agreement to work as a farm laborer for a certain duration. Where citizens are not free to decline the obligations of prospective private contracts, individual liberty has been diminished greatly to achieve the commensurate increase in government authority.

Unlike the antitrust, minimum wage and other purely regulatory statutes, the withdrawal liability statute does not permit the private party, after the effective date, to elect either: (1) to abide by stated requirements, or (2) to abandon participation in the regulated activity. Congress did not permit the employer even such a cold and hard decision as, *e.g.*, choosing between immediate termination of participation in multiemployer pension plans or acceptance of new liabilities as reflected in the statute. The specific intent of the statute was to cause a forfeiture of property if the employer failed to sign a new collective bargaining agreement providing for continued participation in such a pension plan at any time after the effective date of the 1974 statute [*see Connolly v. P.B.G.C.*, 581 F.2d 729, 732 (9th Cir. 1978)] or of the 1980 amendment to the statute (*P.B.G.C. v. R. A. Gray & Co., supra*, 104 S.Ct. at 2715). This is not mere regulation, but is a legislative attempt to deal with an intractable regulatory problem by requiring transfers of wealth from certain private parties to other private parties. Such legislative conduct was proscribed by the Taking Clause in order to forestall problems of a more fundamental and intractable nature.

The proper focus of attention in answering whether the statute takes property[6] is the effect of the statute on the deprived party: Does the enacted statute create a new,

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[6]Whether a statute effects a taking of property is not controlled by the "public" or "private" nature of the subsequent use of the property. *Cf.*, PBGC Br., pp. 19-20. Obviously, if property is taken, that is the fact whether subsequent use is public or private and, if no property is taken, neither private nor public use will occur.

legally enforceable obligation on the part of the deprived party to transfer ownership of property based on an event outside the control of the deprived party? That question is answered affirmatively here because, absent the statute, the employer would have no legal obligation to pay any amount to the pension trust as "withdrawal liability" and, subsequent to enactment, property must be transferred unless the employer agrees to continue in business under terms acceptable to a labor union. This goes beyond the limits of regulating the employer's conduct and takes the employer's property.

PBGC postulates that the statutory imposition of an obligation to pay money is not to be treated as a taking of property under the Taking Clause because, under the statute, the employer "became obliged to pay its fair share of any potential underfunding." PBGC Br., p. 20. Such circular reasoning amounts to an attempt to "redefine" the "property" owned by the employer as subject to the statutorily created obligation to transfer ownership to the pension trust. "Property" cannot be defined by legislatively created obligations against it for purposes of the Taking Clause, any more than "property" can "be defined by the procedures provided for its deprivation . . . " for purposes of the Due Process Clause. *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S.Ct. 1487, 1493 (1985). "Were the rule otherwise," the Taking Clause "would be reduced to a mere tautology." *Ibid.* This is particularly true where, unlike the property interests involved in *Loudermill* and *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974), the property interests owned by the employer were not conferred by the challenged statute, but were gained independently. And when interests in *intangible* property such as the right to continued employment are entitled to protection from legislative "redefinition" of "property," as *Loudermill* holds, then *a fortiori* no less protection is properly accorded under the Taking Clause to the employer's ownership interests in

traditional, *tangible* property including money, real estate and other personal assets.

V.

THIS STATUTE PROVIDES NO COMPENSATION FOR THE PROPERTY TAKEN, AND MUST BE DECLARED INVALID.

PBGC concedes that the withdrawal liability statute makes no provision for compensation to the employer required to pay withdrawal liability and "that no Tucker Act remedy is available to [the employer]." PBGC Br., p. 18, n. 14. Accordingly, upon a determination that the statute effects a "taking of property" within the meaning of the Taking Clause, the statute must be declared invalid. *See* Connolly Br., pp. 33-34.

VI.

THE PUBLIC PURPOSE OF ECONOMIC REGULATION SHOULD NOT BE PERMITTED TO EMPOWER AN ABUSE OF THE TAKING CLAUSE.

PBGC argues that the withdrawal liability statute does not violate the "public use" requirement of the Taking Clause, despite the statutory requirement that money be paid directly to another private party, because the statute has the legitimate "object" of improving the security of private pensions. PBGC Br., p. 19, n. 16. The holding of *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 103 (1954), is as follows:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." *Ibid.*

This does not mean, however, that a legitimate object may authorize the use of an illegitimate means or an abuse of the Taking Clause to achieve the stated object.

A statutory requirement that money be paid by one private party to another as a means of achieving a regulatory "object" is both a violation of a primary aim of the Taking Clause and an abuse of the power of eminent domain. A primary, direct purpose of the Taking Clause was to prohibit the government from taking the property from one person and giving it to another, since "a law that takes property from *A* and give it to *B* . . . is against all reason and justice." *See* Connolly Br., p. 13. Accordingly, a governmental transfer of money from one private party to another is illegitimate as a contravention of a direct purpose of the Taking Clause, and cannot be used as a means of achieving even a concededly legitimate legislative object. In other words, a statutory end cannot justify a constitutionally illegitimate means.

As discussed in the Trustees' opening brief (Connolly Br., pp. 31-33), a statutory transfer of money from one person to another cannot be accomplished by use of the power of eminent domain. Eminent domain empowers a government when the taking of particular property (such as real estate) or property of a particular nature (such as technical data on pesticides) becomes necessary in the public interest. Money, being fungible wealth, is not property of the nature which may give rise to the necessity of a government taking. Thus, unlike the cases involving real estate such as *Berman v. Parker,* or *Hawaii Housing Authority v. Midkiff,* 104 S.Ct. 2321, 2329 (1984), or involving pesticide data such as *Ruckelshaus v. Monsanto Co., supra,* 104 S.Ct. at 2879, the power of eminent domain provides no authority for the taking of money as "withdrawal liability." Moreover, in a proper case of eminent domain, the Taking Clause requires payment of just compensation for the property taken. Congress did not purport to use the power of eminent domain

and, as PBGC concedes, the statute makes no provision to compensate for the property taken. Under such circumstances, eminent domain by no means empowers Congress to declare a "public use" for funds to be taken from one private party and given to another. Surely, PBGC does not mean to argue that a legitimate "object" enables Congress to use the "means" of taking property without compensation under the Taking Clause.

Facing the express prohibition of the Taking Clause, and having no implied power of eminent domain as a foundation for the legislative action, the withdrawal liability statute takes property for "private use" and must be declared invalid.

VII.

WITHDRAWAL LIABILITY AND THE "PREMIUM" PROVISIONS OF THE STATUTE ENACTED IN 1980 ARE INSEVERABLE BECAUSE CONGRESS WOULD NOT HAVE ENACTED THE "PREMIUM" PROVISIONS IN THEIR PRESENT FORM WITHOUT WITHDRAWAL LIABILITY IN THE SAME STATUTORY SCHEME.

PBGC responds to the Trustees' argument that the "premium" provisions of the 1980 statute are inseverable from the "withdrawal liability" provisions and are, therefore, likewise invalid (Connolly Br., pp. 38-40) by simply

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[7]PBGC likewise seeks to minimize the Separation of Powers violation under the 1974 "premium" statute (*see* Connolly Br., pp. 40-42) by substituting legislative necessity for an "intelligible principle" to control the expenditure of funds, and by examining the reporting requirements in isolation from the overall legislative-administrative conduct involved. PBGC Br., pp. 41-42, n. 30. When PBGC had determined the mandatory guarantee program to be "unworkable," thereby making the "will not jeopardize" guideline conclusively unintelligible, and all funds expended by PBGC were for the benefit of constituents of the ranking members of the congressional committees exercising oversight, the overstepping of proper boundaries protected by the Separation of Powers principle is too flagrant to be excused.

pointing to the severability provision enacted in the 1974 statute. PBGC Br., p. 41, n. 30.[7] PBGC's cursory response does not address the crucial questions: (1) whether "[Congress] would . . . have enacted those provisions which are within its power, independently of that which is not," *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677 (1976), and (2) whether the "premium" provisions of the statute could be "fully operative as a law" upon invalidation of the withdrawal liability provisions. *I.N.S. v. Chadha*, ____ U.S. ____, 103 S.Ct. 2764, 2775 (1983). Having encouraged Congress in 1979 to enact "premium" rates ranging from $1 to $2.60 per employee annually, rather than $80 or more per employee (Connolly Br., p. 38, n. 21), based upon inclusion in the statutory scheme of property to be taken from employers as "withdrawal liability," PBGC cannot now argue persuasively that the same "premium" provisions would have been enacted and could serve the same purpose after "withdrawal liability" is stricken.

CONCLUSION

Based on the foregoing, the judgment should be reversed and the case remanded with instructions as set forth in the Conclusion of the Trustees' brief on the merits. Connolly Br., p. 43.

Dated: November, 1985.

Respectfully submitted,

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Nos. 84-1555 & 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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v.

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WOODWARD SAND COMPANY, INC.,
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v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

The National Association of Manufacturers (NAM) files this brief by consent of the parties in support of the appellants. Written consents are filed with the Office of the Clerk.

INTEREST OF THE AMICUS CURIAE

The NAM is a not-for-profit, voluntary business association incorporated under the laws of the State of New York representing approximately 13,500 manufacturers and related business concerns which, in the aggre-

gate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. Many of NAM's members are required by their collective bargaining agreements with various labor unions to make payments to multiemployer pension plans, and many of these plans have some measure of unfunded vested benefits.

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), P.L. 96-364, created and imposed upon contributing employers a liability for the unfunded vested benefits of multiemployer plans which reaches into the tens of billions of dollars and which by the initial estimate of the Pension Benefit Guaranty Corporation (PBGC) exceeded $50 billion.[1] A recent General Accounting Office (GAO) report found $10 billion in unfunded liability in a survey sample consisting of 91 plans—only about 4.7 percent of the total number of plans nationwide.[2] This liability directly affects employers even when they have not withdrawn from a plan because it must be reflected in their financial statements. *Peick v. PBGC*, 724 F.2d 1247, 1278 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984) (dissenting opinion). See p. 6, *infra*.

The withdrawal liability provisions of MPPAA are disrupting the day-to-day conduct of American business. See 128 Cong. Rec. E5326 (daily ed. Dec. 18, 1982). Busi-

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[1] See Pension Benefit Guaranty Corporation, Multiemployer Study Required By P.L. 95-214, App. XIV, at 11, 14 (July 1, 1978) printed in *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess., 1149-1481 (1980) [hereinafter "*PBGC Report*"].

[2] GAO, *Report to the Congress, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, 9 (March 14, 1985) [hereinafter "*GAO Report*"].

nesses cannot be sold; older businessmen cannot retire. *Id.*, 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Plants with declining demand for their products cannot close. *Id.* Huge liabilities are being imposed upon employers as a result of events they do not control, such as losing a competitive bid contract or bargaining to impasse with a labor union. 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Joining a multiemployer plan has become a strike issue. The plans themselves are curtailed in their efforts to recruit new entrants.[3] The threat of withdrawal liability is being used to create serious dislocations in labor-management relations and in the administration of the pension plans themselves.[4] Employers, plans, and plan beneficiaries all are suffering as a direct result of MPPAA's creation of withdrawal liability.

Since NAM member companies are some of the principal obligors of MPPAA withdrawal liability, and since

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[3] One recent study of trucking industry pension plans concluded that MPPAA operates as a significant disincentive to new employers joining multiemployer plans and is, therefore, a major cause of a decline in active participants in such plans, which in turn is causing a decline in the plans' financial conditions. ICF Incorporated, *The Characteristics of Multiemployer Pension Plans in the Trucking Industry* (submitted to American Trucking Associations) (May 1985).

[4] For example, in a complaint recently filed in the United States District Court for the Western District of Washington by the employer trustees of the Western Conference of Teamsters Pension Trust Fund against the Fund's union trustees, the Western Conference of Teamsters and the International Brotherhood of Teamsters, the plaintiffs allege that the Fund's union trustees, under direction from the Western Conference and the Teamsters International, have acted to preserve and substantially *expand* the Fund's unfunded vested liability as a means of creating economic disincentives against employers withdrawing and going nonunion. *Bennett et al. v. Ballew, et al.*, No. C850714, Complaint ¶ 18 (W.D. Wash., filed Apr. 25, 1985). The Western Conference Fund has some 13,000 contributing employers and 515,000 participants. *Id.* ¶ 5.

NAM and its members have a profound and lasting interest in the well-being of the multiemployer pension system in the United States, NAM is vitally interested in the Court's decision in this case.

SUPPLEMENTAL STATEMENT

MPPAA requires that an employer[5] withdrawing from a multiemployer pension plan pay to the plan a pro rata share of the plan's "unfunded vested liability." 29 U.S.C. §§ 1381, *et seq.* (1982). These multiemployer plans are entities created by private contracts to provide pension benefits to covered employees in various industries. The "withdrawal liability" required by MPPAA represents in most cases additional contributions to the plan far in excess of what the employer agreed in its labor contracts. Withdrawal liability, moreover, bears no relationship to the actual cost to an employer of providing for his own employees the same level of benefits promised by the plan.[6] Nor is an employer's liability directly related to the payment of benefits to his own former employees.

The unfunded vested liability for which withdrawing employers must now pay was created for the most part

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[5] MPPAA defines an "employer" to be the group of corporations or other business organizations under common control which includes the employer contracting under the collective bargaining agreement. 29 U.S.C. § 1301(b)(1) (1982); 26 U.S.C. § 414(c) (1982). *See PBGC v. Ouimet Corp.*, 630 F.2d 4, 9-12 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). One legal entity thus may be liable for another entity's withdrawal liability by operation of law without the benefit of any collective bargaining agreement, thus suggesting another taking of property.

[6] Owing to interest rate differentials, it is possible, upon plan termination, to purchase pension benefits at a fraction of the cost of benefits estimated by the plans for funding purposes. *GAO Report* at 24-33. Most plans use an interest rate of 6% for funding purposes while the PBGC's rate for immediate annuities was 10.75% in 1982. *Id.* at 26.

before MPPAA's enactment in 1980 by the actions of pension plan trustees and by the working of economic forces, but not by the employers who are now required to bear its burdens. Prior to the Employee Retirement Income Security Act (ERISA), P.L. 93-406, neither employers nor anyone else was legally liable for a plan's unfunded vested benefits, nor was any penalty attached to withdrawal from a multiemployer plan. With the passage of ERISA in 1974, certain employers contributing to multiemployer plans became subject to a strictly contingent liability. A withdrawn employer could be held to payment of a share of a plan's vested benefit liability only if the plan terminated within five years of his withdrawal, and only if the plan could not meet its obligations. 29 U.S.C. §§ 1362, 1364 (1976); *PBGC v. R. A. Gray & Co.*, —— U.S. ——, 104 S.Ct. 2709, 2713 (1984). The amount of such liability was limited to 30 percent of the employer's net worth. 29 U.S.C. §§ 1362 (b)(2), 1364(b) (1976). MPPAA for the first time imposed upon participating employers a virtually absolute liability, which could exceed each employer's net worth, for the unfunded vested benefits created and accumulated prior to MPPAA's passage, regardless of whether the plan had terminated or was able to meet its obligations. MPPAA thus operated retroactively by creating and assigning to employers an immediate new liability for funding differentials generated prior to the Act's passage.

The size of the statutory liability is staggering.[7] The total employer liability created by the statute appears to be in the tens of billions of dollars. See p. 2, *supra*. Individual employer assessments may be in the millions of dollars; many are in the hundreds of thousands of

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[7] The amount of the liabilities are calculated pursuant to various statutorily sanctioned formulas, selected by the plan trustees, which generally have no relationship to the actual cost of providing the benefit.

dollars. *GAO Report*, at 54. The absolute amounts involved may be less significant to the employer than the fact that withdrawal liability may constitute a substantial portion of, or even far exceed, the emplyoyer's net worth.[8]

An employer, moreover, need not actually withdraw from a plan in order to be affected adversely by the Act. Potential withdrawal liability must be reflected on the employer's financial statements,[9] and thus constitutes a direct reduction of the company's net worth.

The payment of potentially disabling liability may be triggered by any number of events—many of which are beyond the employer's control—and few of which would be changed by the statutory disincentive to withdrawal. The GAO found that most withdrawals (for which reasons could be ascertained) occurred because the employer

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[8] Jurisdictional Statement, Woodward Sand Co., p. 7, n. 7; *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 846 (2d Cir. 1984), *cert. denied*, 104 S.Ct. 3554 (1984) (liability equal to 82% of liquidated value of businesses); *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502, 1506 (9th Cir. 1983), *rev'd sub nom. PBGC v. R.A. Gray & Co.*, 104 S.Ct. 2709 (liability equal to 180% of stockholder equity or two times company's net worth); *I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1205-06 (D.C. Cir. 1984) (liability equal to one-half of net worth).

[9] Financial Accounting Standards Board, *Exposure Draft, Proposed Statement of Financial Accounting Standards, Employers' Accounting for Pensions* (March 22, 1985). For example, in March 1985, the Financial Accounting Standards Board issued for public comment a proposed statement of standards for employers' accounting for pensions. In that proposal, the Board stated its belief that an employer with an unfunded pension obligation has a liability which should be recognized. *Id.* (Summary). The Board proposed an accounting standard that employers participating in multiemployer plans disclose the amount of the obligations the employer would have upon withdrawal from the plan. *Id.* ¶ 64 d, e.

went out of business. *GAO Report*, at 19.[10] Other reasons for withdrawals included employees decertifying their labor unions;[11] a company's closing a subsidiary's operations within the area covered by the pension fund; relocating business operations outside the jurisdiction of the fund; selling the business to a buyer who did not continue contributions; and the death or retirement of a business owner. *GAO Report*, at 19-20. Even a government condemnation of property has caused withdrawal and devastating liability for the business owner. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 741 F.2d 451 (1st Cir. 1984), *rev'd on other grounds*, —— F.2d —— (1st Cir. 1985) (*en banc*).

The Great Majority of Multiemployer Plans Are Stable and Financially Sound

Withdrawal liability is assessed and must be paid regardless of the financial condition of the private pension plan involved or the effect of the liability on the employer.[12] Withdrawal liability must be paid in situations

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[10] *E.g., Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d at 846; *The Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1506 (D.C. Cir. 1984); *Coronet Dodge v. Speckmann*, 553 F. Supp. 518, 520 (E.D. Mo. 1982).

[11] *Flowers Industries, Inc. v. Bakery and Confectioners Union and International Pension Fund*, 565 F. Supp. 286, 287-88 (N.D. Ga. 1983); *Pacific Iron & Metal v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523, 524-25 (W.D. Wash. 1982).

[12] The multiemployer system is quite different than that applicable to single employer plans. First, in single employer plans, the employer makes the pension promise, whereas in multiemployer plans the trustees make the pension promise. Upon transfer of a single employer plan, there is no liability; liability only occurs when the single employer plan is terminated and underfunded. This is not the case with withdrawal liability. Single employer plans limit liability to the amount needed actually to purchase the benefit, not to speculative actuarial computations of possible future costs.

where there should be no governmental interest in pension plans which are financially and actuarily sound and which do not need such funds in order to meet their obligations or to remain solvent. Such circumstances are not the exception. They pertain to the vast majority of all multiemployer plans. *GAO Report* at 8-9, 13. Moreover, employer liability payments need not be used by the plan to reduce its unfunded liability, but instead may be used to increase benefits to current pensioners and attendant unfunded vested benefits or to reduce future contribution levels for continuing employers.

Multiemployer plans are inherently more stable than single-employer plans. H.R. Rep. No. 96-869, pt. I, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2921 [hereinafter cited as "U.S. Code Cong. News"]. An important reason for this is the "employer turnover assumption." In a stable or growing industry, the withdrawal of an employer from a plan usually will not harm the plan because new employment will fill the void created by the withdrawal. *Id.* at 2922. Either new employers will enter, or existing employers will hire additional employees. *Id.* Under such circumstances, an employer's withdrawal will not cause a net loss to the plan's contribution base. *See, e.g., Peick v. PBGC*, 724 F.2d at 1257.

The mere fact that a plan has some measure of unfunded vested benefits (UVB) is not determinative of its financial health. There are many factors which are used to measure the financial condition of defined benefit pension plans.[13] One factor is the present value of the

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[13] Some of the other quantitative factors used to evaluate the financial well-being of a plan include factors used by the PBGC in its 1977 and 1978 studies such as (1) the ratio of retired and inactive vested participants to total participants; (2) the ratio of assets to annual benefit obligations; (3) the ratio of cash flow to assets; (4) the ratio of normal cost to total contributions; and (5) the rate of increase (or decrease) in assets. PBGC Report, at 15, App. XIV.

total amount of vested benefits for which the fund is liable. This is an amount which must be amortized and funded over long periods of time (normally 30 years) and is calculated according to a set of actuarial assumptions and rules adopted by the plan. If a plan's assets are less than the value of its vested benefits, the difference is the measure of the plan's UVB.

Most multiemployer plans have some amount of UVB. In part, this is because plans generally are not designed by the trustees to fund all benefits through employer contributions. A plan can invest the funds it accumulates through contributions and can use its investment earnings to fund benefits. *See* 29 U.S.C. § 186(c)(5)(A) (1982). At any point in time the plan's assets and its liabilities are functions both of its past experience and its predictions of future experience. These in turn are based upon the decisions of the trustees and to some extent upon the operation of external economic forces. As long as the plan is amortizing its UVB on a timely basis, the plan will be in good financial condition. *See, e.g.*, 26 U.S.C. § 412 (1982). The existence of UVB on the books of a multiemployer plan thus does *not* mean that at some point in the future promised benefits will not be paid.

The vast majority of all multiemployer plans are financially sound. In its 1978 Report to Congress, the PBGC expressed concern that, despite the overall good health of multiemployer plans, there existed a relatively small number of plans, only about 2 percent of the total, which were experiencing such serious financial difficulty that they might terminate within five years. U.S. Code Cong. News 2924; PBGC Report, App. I, at 2-3. Another 10 percent were in such condition that the PBGC believed they might terminate within ten years.

A Department of Labor report released in 1984 found that "contrary to popular belief, multiemployer pension plans under collective bargaining, as a group, are rela-

tively well funded . . . ." [14] Based upon data for 1979, the year before MPPAA was passed, this study concluded that the typical multiemployer plan was well funded, with an average funding ratio of 90 percent. *Id.* at 20-21. More specifically, 86 percent of all plans were more than 50 percent funded for vested benefits. *Id.* at 21, 52. Only two percent were poorly funded, *i.e.*, with funding ratios under 25 percent. *Id.*

In 1985, the GAO estimated that only 15.9 percent of all plans are less than 50 percent funded and have low ratios of assets to benefit payments—factors the GAO says indicate a "high potential for insolvency." [15] *GAO Report*, at 8-9, 13. The converse of the GAO's conclusion is, of course, that 84 percent of all multiemployer plans are well funded.[16]

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[14] Department of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining*, p. vi (1984).

[15] Even this 15.9 percent figure must provoke some skepticism. The amount of a plan's UVB is highly dependent upon the actuarial assumptions used in calculating it. *GAO Report* at 14. GAO concedes that the levels of UVB it found in its study were likely overstated because of the use of conservative assumptions. *Id.* Using less conservative interest rates, GAO estimated that total UVB for its sample might be as much as 45 percent *less* than its conservative estimate (reduced from $9.96 billion to $5.4 billion). *Id.* at 14-15. Such a drastic reduction in the amount of UVB shows that plan funding levels were higher than estimated and that fewer plans were under 50 percent funded. *See also* ICF Incorporated, *The Impact of Interest Rate Assumptions on Withdrawal Liability* (July 1985). One further implication of the controversy over the use of conservative interest rate assumptions is that the amounts of withdrawal liability being assessed are significantly greater than what is required to pay for vested benefits. *Id.* at p. 17, ES-2. It is astonishing to note, as the GAO did, that, in fact, it is possible, owing to the mechanics of calculating withdrawal liability, for a plan that is *fully* funded for vested benefits to assess substantial withdrawal liability against an employer. *GAO Report*, at 35-36.

[16] *See also*, Comptroller General, *Report to the Congress, the 1980 Multiemployer Pension Plan Amendments Act: An Assess-*

The GAO Report concluded that withdrawal liability imposed upon employers under MPPAA provided increased financial protection for those plans with "a high potential for insolvency." *GAO Report*, at 8. Consequently, withdrawal liability also provides a measure of protection of the PBGC's program. *Id.* The GAO left unstated, albeit clearly implied, that MPPAA withdrawal liability is unnecessary to provide financial protection for upwards of 84 percent of all multiemployer pension plans. Since 1980, the PBGC has had to provide financial assistance to only two multiemployer plans.[17]

SUMMARY OF ARGUMENT

The NAM believes that Congress may not, under the guise of regulation, take an employer's property and require its transfer to a private multiemployer pension plan to cover past obligations of the plan for which the

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ment of Funding Requirement Changes (Feb. 27, 1985). This report found that 90.6 percent of the plans studied were in adequate financial condition. *Id.* at 19, 23, 25, 27. A 1984 study by the Martin E. Segal Company, which the PBGC endorsed, concluded that three quarters of the plans it reviewed were *fully* funded. Another 11 percent were more than 80 percent funded. Only 4 percent of all plans were less than 50 percent funded. Martin E. Segal Company, *1984 Survey of the Funded Position of Multiemployer Plans.* See *GAO Report*, App. II, p. 72, in which the PBGC called the Segal findings "significant in view of the fact that Segal is the consulting actuary for about one-quarter of all multiemployer plans." Similarly, a 1984 industry study of some 885 construction industry plans found only 5.6 percent of those plans to be under 50 percent funded. Associated General Contractors of America, *Inventory of Construction Industry Multiemployer Pension Plans, June 1984*, at pp. vii-viii.

[17] PBGC, *1984 Annual Report*, pp. v, 12. As of the end of FY 1983, the PBGC had identified only five plans that would require future financial assistance, and it has established a reserve to cover the estimated uncollectible amount of such assistance. *Id.* at 36. In 1984, the PBGC identified no additional plans that might require future assistance. *Id.*

employer had no liability. The withdrawal liability provisions of MPPAA constitute a direct and heavy governmental interference with the reasonable, investment-backed expectations of employers who joined multiemployer pension plans prior to passage of the Act in 1980. The creation and imposition of preenactment multiemployer pension liabilities on all employers and the actual assessment of those liabilities against withdrawing employers constitute the taking of the employers' property for which no compensation is paid. This statutory scheme operates in plain contravention of the Fifth Amendment.

Withdrawal liability does not represent the mere regulation of the burdens of economic life, for, unlike true regulation, it looks backward to correction of the economic effects of past acts of others and to past events rather than to the control of future conduct. MPPAA's impact is retroactive because it created and imposed upon employers a massive liability for estimated funding differentials caused in the past and accumulated over many years—a liability for which employers were not responsible and which they certainly never agreed to assume.

The creation and mandatory payment of withdrawal liability represents the substantial destruction of established property interests of one private person for the benefit of others in a manner and in circumstances which fail to serve the purposes which Congress intended—pension security through the reduction of unfunded vested benefits. NAM accepts that Congress has broad legislative authority as to economic regulation, but this authority is not unbridled and the Taking Clause is the constitutional check on that power.

If the withdrawal provisions of MPPAA are held to be mere economic regulation, then there would no longer exist a meaningful distinction between the regulation of property and its confiscation. The Taking Clause of the Fifth Amendment would be void of real meaning.

ARGUMENT

I. MPPAA EFFECTS THE TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

NAM submits that MPPAA clearly constitutes the taking of private property without the justification of public purpose and without compensation in violation of the Fifth Amendment.

Those lower courts that have considered the Taking Clause in the context of withdrawal liability have rejected its application. They have not, however, been able to agree as to why this should be so. This disharmony is indicative of the wrong analyses of the statute and its practical effects applied by the courts—most of whom have given little more than a passing glance to the issues involved. Most disconcerting are the conclusions reached by some courts, including the district court in the present case, that employers who are forced by law to incur huge liabilities on their balance sheets and to pay to their former pension funds hundreds of thousands or millions of dollars are in no way deprived of their "property." [18] Other courts have determined that while property rights might be involved, MPPAA is merely a governmental "adjustment of the benefits and the burdens of economic life" and does not, therefore, work a "taking" in the constitutional sense.[19] Yet another court suggested (but did not decide) that MPPAA might well effectuate an unconstitutional taking of the employer's property, if the em-

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[18] *Also, Peick v. PBGC*, 724 F.2d at 1274. *Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1406 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2116 (1985).

[19] *Terson Company, Inc. v. Bakery Drivers and Salesmen Local 194 and Industry Pension Fund*, 739 F.2d 118, 121 (3d Cir. 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 642-43 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 3553 (1984).

ployer could show that the liability imposed had totally destroyed his rights to the liquidation value of his business. *Keith Fulton & Sons*, 741 F.2d 451.

None of the courts that have decided the issue, however, have performed the type of analysis NAM believes is mandated by the decisions of this Court. Such analysis, when made, we submit, leads to quite different conclusions from those reached in the lower courts.

A. MPPAA Interferes With Substantial Property Interests of the Employer

The reality of MPPAA is that, following its passage, employers have been required to recognize financial liabilities on their balance sheets and upon withdrawal to pay substantial sums of money to the penion funds from which they have withdrawn. These represent the loss of property as a direct result of government action. It is not necessary to determine whether the contractual interest in limiting pension fund contributions derived from the employer's collective bargaining agreements is in itself a property interest. The employer's property interests are more obvious and tangible than that.

This Court has referred to the term "property" as including the entire "group of rights inhering in the citizen's [ownership]." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 142 (1978) (dissent), *quoting*, *United States v. General Motors*, 323 U.S. 373, 377-78 (1945). *See Ruckelshaus v. Monsanto Co.*, —— U.S. ——, 104 S.Ct. 2862, 2873-74 (1984). The notion of property extends "beyond land and tangible goods and includes the products of an individual's 'labour and invention.'" *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. at 2873, *citing* 2 W. Blackstone, *Commentaries*. The Taking Clause is addressed to "every sort of interest the citizen may possess." *General Motors*, 323 U.S. at 377-78. Elsewhere the Court has defined property in terms of the "interests that were sufficiently bound up with the reason-

able expectations" of the owner. *Penn Central*, 438 U.S. at 124-25.

An employer certainly owns the money it must use to pay withdrawal liability. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). He has an ownership interest in all of the assets of his company —whether they are physical, cash, or more intangible items. The Court has found the existence of property in much less tangible interests than the money or the imposed liabilities involved here. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. at 2873.

The employers' interests destroyed or diminished by MPPAA are indeed reasonable investment-backed expectations. Prior to the passage of MPPAA, an employer had a reasonable expectation of keeping the value of his business upon withdrawing from a multiemployer pension plan. He had entered into pre-MPPAA collective bargaining agreements with the expectation that he could contribute clearly defined amounts to the pension plan to provide for his employees' retirements. The employer who had contributed to a multiemployer pension plan also could reasonably expect that he was not legally liable for any actuarial discrepancy between the assets of the plan and its projected vested liability. In the first place, the employer had nothing to do with creating this differential, and in the second place, the differential had never been recognized as a legal liability attributable to anyone. With respect to the vast majority of plans which were not in any financial difficulty, such funding differentials were merely theoretical and did not even represent a recognized problem.

The employer participating in a multiemployer plan, especially a well-funded plan, could reasonably expect to be able to sell his business, sell his assets, or for other legitimate business reasons, withdraw from the plan without incurring legal liability for the penion plan's unfunded vested benefits in amounts which could substan-

tially diminish, if not completely eliminate, the economic value of the business property. The employer's collective bargaining agreements, which explicitly limited the amount of his contributions to the plan, were a primary, although by no means the only, reason that the employer's expectations in this regard were reasonable.

In 1974, ERISA itself had created reasonable expectations that employers might become liable for funding shortfalls only upon the termination of their plans in an insolvent state. During the period 1974-1980, Congress in effect had represented to employers that they could withdraw from multiemployer plans without liability, unless the plan subsequently terminated and was underfunded. In *Ruckelshaus v. Monsanto Co.*, this Court held that, under a prior statutory scheme, such a legislative guarantee formed the basis of a reasonable investment-backed expectation. 104 S.Ct. at 2877-79.

Prior to MPPAA's passage, employers had reasonable expectations that their financial assets were not subject to confiscation by their pension plans upon withdrawal—especially withdrawal from healthy plans—and they clearly possessed economic interests that were bound up with those expectations.[20] The money in the company could be used for whatever purpose the employer saw fit and would not have to be committed to the payment of pension plan UVBs. To suggest, as some courts have, that the money and value of which the employer is clearly deprived by operation of the statute does not violate the Taking Clause because it is not "property" defies the definition of the term and defies the sense of the Court's jurisprudence; it is plainly arbitrary and irrational.

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[20] Stockholders who have sold businesses which were employers contributing to multiemployer plans have had to reduce the price for the stock to reflect the pension liability of the employer even though there was no withdrawal. This form of taking is even more disturbing, for the pension plan never gets the benefit of the property.

B. The Imposition of Withdrawal Liability Constitutes a Taking of the Employer's Property

This Court has noted that the Fifth Amendment's Taking Clause "is designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123, *quoting*, *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The principle was well illustrated in its application in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), in which the Court struck down as a violation of the Taking Clause a federal statute which applied retroactively to permit mortgage debtors to purchase their property for less than fair market value, thus taking the rights of the mortgage lender. There Justice Brandeis, writing for the Court, stated that:

> The Fifth Amendment commands that, however great the nation's need, private property shall not be . . . taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of relief afforded in the public interest may be borne by the public.

Id. at 602. *See United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

In *Penn Central*, the Court observed the difficulty it has had in developing a set formula "for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. 438 U.S. at 124. It identified, however, the factors it considered particularly significant in determining whether a taking had occurred. *Id.* These included

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . . [And] the character of the governmental action.

Id.; *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. at 2875. With respect to the latter factor, the Court in *Penn Central* went on to state that a taking might be "more readily found" when the interference takes the form of a physical invasion than when "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. It is this last phrase the courts have seized upon and applied as a fast rule of law to disavow the existence of a taking in the present context.

The plain language of *Penn Central* indicates that it was never intended to state a definite rule that government economic regulation could not constitute a taking. Indeed, the Court has long recognized that government regulation that goes "too far" can and will be held to be a taking of property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, —— U.S. ——, 53 U.S.L.W. 4969 (June 28, 1985). As the Court recently reiterated in *Ruckelshaus v. Monsanto Co.*, "governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." 104 S. Ct. at 2874, *quoting United States v. General Motors Corp.*, 323 U.S. at 378. *Penn Central*, we submit, merely recognizes the difficulty of analysis of the taking issue when government regulation has caused economic injury without a clear physical invasion. The analysis still must be done.

MPPAA's imposition of withdrawal liability, as it applies to the $50 billion pre-1980 pension obligation, exhibits few characteristics of true regulation. In the first

place, it is plainly retroactive rather than prospective in its effect. *See, United States v. Security Industrial Bank*, 459 U.S. 70 (1982) ("[T]here is substantial doubt whether the retroactive destruction of the appellees' liens . . . comports with the Fifth Amendment"). It created a new and unexpected legal liability for the results of past events and conduct by others and assigned that obligation to employers, causing them immediate economic injury.

The MPPAA withdrawal liability provisions generally do not regulate conduct prospectively, such as by mandating faster funding or even by requiring that the liability payments be used to reduce the supposed underfunding. MPPAA does not purport to regulate the act of withdrawal and indeed could not do so because the conduct which results in withdrawal generally is legitimate business or labor behavior. The Act does not regulate in the common sense of preventing the use of property in a manner detrimental to the public interest. Rather, it takes property by requiring the employer to pay to the pension fund some amount of withdrawal liability calculated by the plan.

Unlike regulation, the statute does not apply equally to all persons subject to its provisions. Employers who withdraw will experience different results from application of the statute depending upon the rules and financial condition of their plans. Some withdrawing employers pay nothing, if the plan is fully funded; others may have to pay and be wiped out by the liability.

In concept and operation, MPPAA is clearly more like the outright destruction of property involved in *Radford*, *Armstrong*, and *Ruckelshaus*, *supra*, than like traditional forms of government regulation of the use of property.[21] When a withdrawal occurs, the Act mandates that the

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[21] *E.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (land use); *Penn Central*, 438 U.S. 204, and cases cited therein.

employer, merely upon demand by the pension fund, transfer its property to the plan to be used for whatever purposes the plan sees fit. This is not a mere abstract diminution in the economic value of the employer's property. It is a direct and absolute confiscation of one citizen's private property for the benefit of other private citizens. It is a forced contribution to the general revenues of the plan. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S., at 163.

That impact upon the employer may be substantial. The interference with the precise subject matter of the taking—the monies required for payment—is, of course, complete. The impact may also be devastating in relative terms—substantially diminishing or even wiping out entirely the employer's net worth. See pp. 5-6, *supra*. It is in these respects wholly different from the sort of partial interference involved in *Penn Central*.

Moreover, when MPPAA became law on September 26, 1980, it suddenly created a massive $50 billion plus legal liability for pension funding differentials. Those differentials had been accumulating gradually since the late 1940s and had never before constituted cognizable legal liability. Now they constitute reportable liabilities on the books of the companies that participate in these plans which directly reduce all of these firms' net worth.

For any employer who joined and participated in a multiemployer plan prior to September 26, 1980, and was thereafter burdened with liability for UVB accumulated prior to that date, withdrawal liability represented a dramatic interference with his investment-backed expectations. A business that was only marginally profitable or actually failing could no longer sell or liquidate without incurring substantial unbargained for liabilities which might consume what remaining worth the employer had. An employer's employees, simply by changing their union representation, might cripple the company economically. Labor unions may unleash the specter of with-

drawal liability to obtain significant concessions in collective bargaining because the employer cannot afford to reach an impasse. *See, e.g., Shelter Framing Corp. v. PBGC*, 705 F.2d at 1506; *S&M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867, 868 (C.D. Cal. 1982). Without doubt, MPPAA interferes very directly and quite substantially —often completely—with the employer's investment-backed expectations concerning the value of his business and the use of his assets.

NAM submits that at least as to employers who participated in multiemployer plans pursuant to collective bargaining agreements entered into prior to September 26, 1980, the imposition of withdrawal liability for unfunded vested benefits created prior to that date represents a taking of the employer's property. It is this retroactive imposition of liability for past events and circumstances that substantially interferes with the employer's reasonable investment-backed expectations—*i.e.*, that takes his property.

If Congress has determined through ERISA that it is a matter of public concern that pension plans reduce or eliminate unfunded vested benefits, regardless of the plan's design and regardless of whether the employers ever agreed to contribute sufficient funds to pay for such benefit levels, then the burden of that governmental concern is being allocated disproportionately to a small group of employers. The public as such assumes none of the burden.[22] Employers who continue in the plans pay nothing more than what their contracts specify. It is only

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[22] Congress could have imposed higher premiums on its PBGC insurance and mandated faster funding with minimum funding levels. In so doing, it would never have had to create withdrawal liability and impose the taking inherent in the concept of withdrawal liability. Such action would have been purely in the nature of regulation.

the relatively small group of employers who withdraw—many of whom are the least able to bear such burdens—who must actually pay allocated shares of unfunded vested benefits, in violation of the most fundamental tenet of the Fifth Amendment.

The imposition of withdrawal liability is a taking of property. It goes virtually without saying that this taking is not compensated.

C. The Taking of the Employer's Property Is Not Justified by a Public Purpose

While it is unnecessary, if there is an uncompensated taking of private property, to determine whether that taking is supported by a public purpose, the lack of a clear public purpose in most withdrawal liability further reflects MPPAA's conflict with the Constitution.

This Court has recently reaffirmed that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Hawaii Housing Authority, et al. v. Midkiff, et al.*, —— U.S. ——, 104 S. Ct. 2321, 2329 (1984), *quoting Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937). This Court's role in ascertaining the existence of a public purpose is limited to determining whether Congress' purpose is legitimate and whether Congress rationally could have believed that the provisions would promote that objective. *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. at 2330.

Congress might legitimately concern itself with the payment of promised pension benefits in cases where the private system has failed. But, when a pension plan that is well-funded and not in danger of insolvency assesses withdrawal liability against an employer who has withdrawn involuntarily or for legitimate business reasons, it is difficult to ascertain any public purpose in the taking. This is especially true when the withdrawal results

in no loss to the plan's contribution base. In such cases, withdrawal liability does not represent the payment of promised benefits that would not otherwise be paid nor does it appreciably protect the PBGC's assets. Congress does not have a legitimate purpose in transferring, through retroactive legislation, the wealth of a few employers to private pension plans so that benefits may be increased or contributions by other employers reduced.

While it may be difficult for Congress in enacting legislation ostensibly for the protection of financially troubled plans to determine in advance which plans are distressed and when its remedies therefore should apply, this does not negate the fact that in the great majority of cases the imposition of withdrawal liability serves no discernible governmental purpose. Congress made no attempt to limit the remedy of withdrawal liability to those cases in which it would serve the legislative purpose. It is, moreover, both possible and practical to ascertain objectively which plans are in trouble and which are not. The PBGC, the GAO, and the DOL all have used objective criteria, such as funding ratios, asset-to benefit payment ratios and the like, to make such determinations for their own purposes. *See* pp. 8-9, *supra*.

Even where there is a need for better plan funding, withdrawal liability cannot be justified. First, it is an uncompensated taking. Further, the nature of the property negates the implication of a public purpose. Since money is fungible and an employer's money is no different from the money of anyone else, there can be no public purpose satisfied by the taking of the employer's money. The public has no particular need for the distinct property being taken.

Where the facts and circumstances of a case demonstrate that no public purpose exists, an assessment of withdrawal liability is clearly an unconstitutional taking of private property.

II. THE COURT WILL NOT DEBILITATE MULTIEMPLOYER PENSION PLANS, IF IT REVERSES THE DECISION BELOW

Should the Court reverse the lower Court's decision, it will not radically affect the multiemployer pension plan system. Only a very few multiemployer plans have serious financial difficulties, and it appears that the PBGC has adequate assets in its multiemployer fund to cover these identifiable contingencies.[23] For the great majority of plans, elimination of withdrawal liability would represent merely the loss of periodic windfall payments. Voiding this liability would, on the other hand, eliminate a serious impediment to new employers joining and stabilizing or increasing the contribution base of multiemployer plans. It would relieve the economic gridlock caused by withdrawal liability.

Should the Court hold MPPAA's withdrawal liability provisions unconstitutional, moreover, the effect could be the reinstatement of Sections 4062 and 4064 of ERISA, 29 U.S.C. §§ 1362, 1364 (1976), which had provided for the system of contingent liability in the period before MPPAA.[24]

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[23] The PBGC has established a reserve of $19.4 million for future financial assistance to cover estimated nonrecoverable future payments to be made for multiemployer plans that have notified the PBGC they are experiencing financial difficulty. PBGC, *1984 Annual Report*, at 29, 39. Overall, the PBGC reports the assets of its multiemployer program as $60.8 million. *Id.* at 29-29. As of FY 1984, the PBGC's multiemployer fund has experienced no net loss from program operations, and, in fact, would appear to have experienced a $17 million gain. *Id.* at 30-31; PBGC, *1982 Annual Report*. This is to be distinguished from the experience of the single employer fund.

[24] Sections 403(g)-(i) of MPPAA, 94 Stat. 1301, amended Sections 4062-4064 of ERISA, 29 U.S.C. §§ 1362-1364 (1976), to make those earlier provisions inapplicable to multiemployer plans. These conforming amendments are not severable from the withdrawal liability provisions of MPPAA. *INS v. Chadha*, —— U.S. ——, 103 S.Ct. 2764, 2775 (1983); *Buckley v. Valeo*, 424 U.S. 1, 108

Congress can act to avoid problems brought on by distressed pension plans, but legislative solutions must be designed to fit the problem. *See, United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977). We suggest, too, that if the problem were, as Congress seems to have thought, one of broad public import, then the teachings of *Radford*, *Armstrong* and other cases ought to be heeded and the problem shared more by the public. Congress has the power to regulate to insure better funding of multiemployer plans and to collect and distribute funds necessary to afford financial protection for poorly funded plans experiencing financial difficulties without violating the Taking Clause. The withdrawal provisions of MPPAA have failed to do that.

NAM and its member companies feel strongly that pension obligations must be taken seriously and fulfilled. The future of the defined benefit pension program in this country, however, does not lie in legislating massive, retroactive, unnecessary, unfair transfers of wealth from employers into private pension plans in subversion of constitutional principles. More moderate, targeted solutions to better funding of multiemployer plans are available. While it is not the role of the Court to dictate legislative solutions, the Court can and should nevertheless find that what Congress has done in MPPAA is plainly and deeply inconsistent with the most elemental principles of the Constitution. Congress' authority to regulate economic affairs is expansive but not limitless. The Taking Clause still stands as a bulwark against excessive regulation that confiscates rather than restricts the use of property, that destroys ownership rather than merely limits its incidents in the name of the common good. MPPAA's withdrawal liability is not regulation; it is an unconstitutional taking of private property.

(1975). Thus, if the withdrawal liability provisions are declared unconstitutional and void, the conforming amendments are also void and the contingent liability provisions of ERISA would again be applicable to multiemployer plans.

CONCLUSION

The decision of the District Court should be reversed.

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Nos. 84-1555, 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN L. CONNOLLY, *et al.*,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION, *et al.*,
Appellees.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE,* IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Can Congress constitutionally attempt to preclude companies from going out of business by penalizing such changes through the imposition of withdrawal liability, where the companies have neither causal nor contractual responsibility for the problem addressed?

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IN THE

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OCTOBER TERM, 1985

Nos. 84-1555, 84-1567

JOHN L. CONNOLLY, *et al.*,
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On Appeal from a Three Judge Court of the United States District Court for the Central District of California

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., *AMICUS CURIAE,* IN SUPPORT OF REVERSAL

INTEREST OF THE AMICUS

The American Trucking Associations, Inc. ("ATA") is the national trade association of the trucking industry, which includes more than 31,000 carriers regulated in interstate commerce. Many of these firms contribute to multiemployer pension plans and are thus subject to withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), as amended, 29 U.S.C. §§ 1381-1405 (West Supp. 1985).

The MPPAA newly imposed on employers signatory to collective bargaining agreements, pursuant to which contributions to multiemployer pension plans were required, an absolute liability for a share of the pension plan's underfunding if the employer ceased making contributions for any reason including going out of business.[1] The Act thus made such employers the guarantors of the unfunded vested liabilities of the plans. This imposition has had a devastating impact on the trucking industry for two reasons.

The first reason is the very size of the imposition. The two largest Teamsters Union plans—the Western Conference of Teamsters Plan and the Central States, Southeast and Southwest Areas Teamsters Plan—alone in 1981 had a combined unfunded vested liability of $5 billion. United States Department of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining* at 21 n.4.[2] In 1980 the stockholder's equity of the entire trucking industry—nonunion as well as union—was approximately $5 billion. *See* F.W. Liddell, *Financial Analysis of the Motor Carrier Industry* at 22, 37 (1981).

Second, the trucking industry has been particularly hard-hit by withdrawal liability because of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793. That Act substantially deregulated the trucking industry and has caused a significant increase in both nonunion and union competition. It thus has forced a major restructuring of the unionized portion of the industry. Yet, the MPPAA, enacted only 87 days after

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[1] The term "going out of business" is used in this brief to mean any method by which a company can withdraw the value of its assets from a particular use, including dissolution, liquidation, and sale of the business.

[2] Several other Teamsters plans have unfunded vested liability in excess of $100 million each. *See, e.g., id.* Appendix D at 173, 188.

the MCA, penalizes through the imposition of withdrawal liability the actions necessary for such an industry-wide restructuring and deters unprofitable businesses from going out of business. ATA believes that the penalization of such business decisions and the attempt to force unprofitable companies to stay in business violates the Takings Clause of the fifth amendment. ATA therefore files this brief urging reversal of the court below.[3]

SUMMARY OF THE ARGUMENT

The MPPAA imposes withdrawal liability for necessary changes in a business operation such as selling a business or going out of business. Yet withdrawal liability is a noncontractual imposition and the employer has neither contractual nor causal responsibility for the problem to which withdrawal liability is directed, pension plan underfunding. The Act thus burdens and restricts an employer in his business decisions—including the decision to cease business altogether—without a sufficient nexus to the problem. The unwarranted restriction on the employer's rights with respect to his assets violates the Takings Clause under the *Brooks-Scanlon* doctrine.

ARGUMENT

I. The *Brooks-Scanlon* Doctrine Prohibits Legislative Effort to Force Companies to Stay in Business Against Their Will.

The threat of withdrawal liability effectively precludes employers desiring to retrieve and transfer assets to other uses from going out of business. Such a preclusion violates the Takings Clause.

The Supreme Court sustained the constitutional right to go out of business in *Brooks-Scanlon Co. v. Railroad*

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[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Clerk of the Court.

Commission, 251 U.S. 396 (1920). The Brooks-Scanlon Company owned a small railroad company, primarily used as a logging road, and also owned a sawmill and lumber business. The railroad company became unprofitable because of declining volume. Brooks-Scanlon sought to discontinue the railroad business, but the state railroad commission and state supreme court ordered that it must operate.

The Supreme Court reversed, holding that to compel the railroad to stay in business against its will was an unconstitutional taking of private property by the state.[4] The Court held, first, that the carrier "cannot be compelled to carry on" its business at a loss. 251 U.S. at 399. Thus, the carrier's obligation to fulfill state regulatory commands lasts only so long as it "continues to exercise the power conferred upon it by a charter from a State." *Id.*

Second, the Court made explicit the right of property owners to withdraw from a losing business:

> If the plaintiff be taken to have granted to the public an interest in the use of the railroad it *may withdraw its grant by discontinuing the use* when that use can be kept up only at a loss.

Id. at 399 (emphasis added); *accord Bullock v. Florida ex rel. Railroad Commission*, 254 U.S. 513, 521 (1921) ("Without previous statute or contract to compel the

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[4] Although *Brooks-Scanlon* involved the fourteenth amendment, the courts have recognized that fourteenth amendment precedents, specifically including *Brooks-Scanlon* and others discussed below "are applicable, a fortiorari, to federal action . . . since the fifth amendment, unlike the fourteenth, contains an express prohibition against unconstitutional takings. Congressional power under either the bankruptcy clause or the commerce clause is limited by the fifth amendment." In re Penn Central Transportation Co., 494 F.2d 270, 278 (3d Cir.), *cert. denied*, 419 U.S. 883 (1974) (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589-90 (1935)).

company to keep on at a loss would be an unconstitutional taking of its property."); *Railroad Commission v. Eastern Texas Railroad Co.*, 264 U.S. 79, 85 (1924) ("To compel [a company] to go on at a loss or to give up the salvage value would be to take its property without the just compensation . . .").

The *Brooks-Scanlon* decision is a centerpiece in the law of unconstitutional takings. Federal courts have consistently recognized the constitutional right to withdraw property from an existing use. This right—denominated the "*Brooks-Scanlon* right" by contemporary courts [5]—is so basic a doctrine of constitutionally protected property that courts now describe it as a "fundament of the taking provision." *In re Central Railroad Co. of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974). The courts have consistently reaffirmed the *Brooks-Scanlon* right in the last decade.[6]

The MPPAA imposes potentially unlimited liability [7] for any permanent cessation of contributions to a pension

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[5] *See, e.g.*, In re New York, Susquehanna & Western Railroad Co., 504 F. Supp. 851, 859-60 (D.N.J. 1980); In re Penn Central Transportation Co., 458 F. Supp. 1234, 1277 & n.43 (E.D. Pa. 1978).

Although most cases applying the *Brooks-Scanlon* doctrine have involved railroads, the doctrine is not limited to railroads. *See* Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U.S. 403, 413-14 (1936).

[6] In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 611 F.2d 662, 666-67 (7th Cir. 1979); In re Penn Central Transportation Co., 494 F.2d at 280-82; In re New York, Susquehanna & Western Railroad Co., 504 F. Supp. at 859-60.

[7] Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir.), *cert. denied*, 104 S. Ct. 3554 (1984) demonstrates that withdrawal liability can exceed the value of a company. There, the stockholder of a company liquidated the assets and distributed net proceeds of $733,082 to the stockholders. The pension fund subsequently demanded withdrawal liability, which the parties stipulated to be $817,398.

plan, including going out of business.[8] The stranglehold this places on the trucking industry can be estimated from the size of the unfunded vested benefits of plans to which trucking companies contribute. *See supra* p. 2. The price of going out of business thus can be 100% of the company's assets. To so penalize the right is to deny it, since the freedom to go out of business is meaningful only if the employer can transfer his assets to a profitable use. The result in *Brooks-Scanlon* could not have been different if, instead of commanding Brooks-Scanlon to keep the railroad in business, the railroad commission had said Brooks-Scanlon could stop the railroad but at the price of 100% of the value of the railroad.

Indeed, a central purpose of withdrawal liability was to seek to compel companies to stay in business against their will. When the Pension Benefit Guaranty Corporation ("PBGC") first proposed withdrawal liability, it justified the imposition in part as necessary to "provide a disincentive to voluntary employer withdrawals." PBGC, *Multiemployer Study Required by P.L. 95-214* at 97 (July 1, 1978) ("PBGC Study"); *accord* PBGC, *Recommendations to the Congress for Revising Multiemployer Plan Termination Insurance* at 16 (Feb. 1979) ("Requiring withdrawing employers to compensate the plan would create a financial disincentive to withdraw . . .").

The reality is that most—if not all—withdrawals are "voluntary" changes in business operations dictated by

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[8] The existence of the contingent liability provides a deterrent to sales. Although the MPPAA has exceptions that apply to sales or mergers, *see* 29 U.S.C. §§ 1384, 1398 (1982), these exceptions merely avoid triggering the liability and thus do not change potential liability. The deterrent effect on sales is not altered. *See also* PBGC Opinion Letter of November 24, 1981 (warning that selling a company through sale of stock does not "necessarily" mean that "the seller of the stock is forever clear of any liability to the plan").

economic circumstances unrelated to the contribution obligation. Because the contribution obligation is undertaken as part of a collective bargaining agreement, the employer cannot at will cease contributions during the life of the agreement, and the union can strike the employer in contract negotiations to compel him to agree to make contributions.[9] The employer can "voluntarily" cease contributions only if he goes out of business altogether or sells his company.[10]

MPPAA must be seen for what it is: an effort to lock employers into a permanent relationship with a pension plan by threatening them with confiscation of their assets if they go out of business. *Brooks-Scanlon* prohibits such an effort at statutory compulsion to stay in business.

II. The *Brooks-Scanlon* Right Cannot Be Abrogated Where the Company Has Not Agreed To Be Responsible for the Financial Stability of a Multiemployer Plan and Had No Share in the Creation of the Problem.

Burdening the employer's right to go out of business might be treated as not within the *Brooks-Scanlon* doctrine if the employer had some contractual or causal responsibility for the problem addressed, *i.e.*, if withdrawal liability were in some sense a debt of the employer. No such relationship exists here.

An employer contributing to a multiemployer plan makes no promise, express or implied, of pension benefits

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[9] NLRB v. Amax Coal Co., 453 U.S. 322 (1981).

[10] An employer also "withdraws" if his employees decertify the union—a right of the employees under the National Labor Relations Act over which the employer has no control. With respect to trucking employers party to Teamsters collective bargaining agreements, the employer cannot cease contributions by moving locations—he merely makes contributions to a different fund (an event which under the MPPAA nonetheless triggers withdrawal liability to the first fund).

to his employees.[11] In arms-length negotiations with the union, he solely agrees to make contributions to the pension plan during the course of the collective bargaining agreement based on the number of weeks or hours worked by the employees. The plan itself has sole control over the management of the plan and makes such critical determinations as the length of service necessary for the pension to vest and the level of benefits.[12]

Moreover, the employer's reliance on the nature of his obligation to the fund is significant. In view of the employer's lack of control over the plan, he could only agree to make negotiated contributions and could not agree to underwrite the financial stability of the plan—otherwise, he would be writing the plan a blank check.

With no contractual undertaking to pay pension benefits, an employer can be held liable retrospectively for the benefits promised by the plan only if it can be shown that the employer was somehow responsible for the alleged financial instability of multiemployer plans. Where

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[11] Several district courts have recognized that withdrawal liability is noncontractual. *See* T.I.M.E.-DC, Inc. v. I.A.M. National Pension Fund, 597 F. Supp. 256, 258 (D.D.C. 1984); Debreceni v. Healthco-D.G. Stoughton Co., 579 F. Supp. 296, 297-98 (D. Mass. 1984); T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund, 560 F. Supp. 294, 297 (E.D.N.Y. 1983); Peick v. PBGC, 539 F. Supp. 1025, 1062 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984). Two courts have expressly noted that withdrawal liability is a "penalty." T.I.M.E.-DC, Inc. v. I.A.M. National Pension Fund, 597 F. Supp. at 258; T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund, 560 F. Supp. at 297.

[12] These features of multiemployer plans are in stark contrast to the single-employer plan held constitutional in Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). There, the company had agreed through collective bargaining to pay a fixed level of benefits to its employees, based on years of service, and further agreed to fund the plan on an actuarial basis at a level sufficient to meet the obligation of fixed benefits. The employer had thus expressly promised benefits to his employees and had control over the funding.

agreement is lacking, a showing of employer responsibility for the creation of the problem addressed is the only other constitutional basis for retrospective employer liability.[13] But the employer has no such responsibility—he solely agreed to make contributions and had no control over the trustees' administration of the fund.[14]

Indeed, Congress itself must bear a large measure of the responsibility for the problem to which the MPPAA was directed—financially troubled and unstable multiemployer plans. Prior to ERISA, multiemployer plans were sound and rarely terminated.[15] ERISA increased the plans' unfunded liability through minimum vesting and non-forfeitability rules[16] and restricted the ability of multiemployer plans to respond to financial difficulties,[17] but placed no constraints on plan adoption of ben-

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[13] This is the lesson of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), where the Supreme Court held that Congress could constitutionally impose on coal mining companies retrospective liability for black lung disease contracted by employees in the course of employment. The Court emphasized that the liability was predicated on "a specific need created by the dangerous conditions under which the former employee labored." *Id.* at 19.

[14] *See* NLRB v. Teamsters Union Local 582, 670 F.2d 855 (9th Cir. 1982) (court upheld a plan's granting of a new benefit even though the employers had specifically refused that benefit in collective bargaining); Sinai Hospital v. National Benefit Fund, [1982] Daily Lab. Rep. (BNA), No. 249, at D-1 (4th Cir. Dec. 15, 1982) (the court invalidated an employer's effort to limit benefit increases by obtaining union consent to a limitation in the collective bargaining agreement). Furthermore, nothing in the MPPAA requires a fund to use withdrawal liability payments to reduce underfunding rather than raising benefits.

[15] *See PBGC Study, supra* p. 6, at 4 ("Before passage of ERISA, terminations of multiemployer plans were extremely rare.").

[16] *See* 29 U.S.C. § 1053 (1982).

[17] *House Comm. on Education and Labor, The Multiemployer Pension Plan Amendments Act of 1979*, H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 54 (1980) ("ERISA restricts the flexibility such plans had to defer funding, restrict vesting or reduce benefits").

efit increases.[18] The employer liabilities under ERISA discouraged new entrants,[19] thus providing no mechanism for replacing the contributions of employers who "withdrew" because they went out of business.

The MPPAA thus places the burden of the solution to the problem of pension plan underfunding on the shoulders of the withdrawing employer who had never agreed to be the guarantor of a pension plan's solvency. The interests of the pension plan are protected at the expense of a party without responsibility for the problems of multiemployer plans and without control over the plan's unfunded liability.

CONCLUSION

Congress has no power to penalize and burden a company's right to go out of business as a solution for a problem not of the employer's making. ATA respectfully suggests that the decision of the three-judge panel below be reversed.

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[18] *See* 126 Cong. Rec. H4163 (daily ed. May 22, 1980) (remarks of Rep. Erlenborn).

[19] The PBGC feared that the ERISA rules would discourage new entry. *PBGC Study, supra* p. 6, Appendix I at 7.

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IN THE

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JOHN L. CONNOLLY, et al.,
Appellant,

v.

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Appellee.

and

WOODWARD SAND CO., INC., et al.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION, et al.,
Appellee.

BRIEF OF AMERICAN WAREHOUSEMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF AMERICAN WAREHOUSEMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTRODUCTION AND STATEMENT OF INTEREST

The AMERICAN WAREHOUSEMEN'S ASSOCIATION (AWA) is the national trade association of the public merchandize warehousing industry. It has 430 members located throughout the United States.

The public warehouse industry has historically consisted of small businesses, owned by individuals or families who reside where the warehouse is located.

Because public warehouses are constantly involved in the motor transportation of goods, both inbound and outbound, it has usually been the teamsters union which has organized warehouse employees. Along with such teamster representation has come the requirement to belong to teamster multi-employer pension plans.

Virtually all of the public warehousemen who are bound by multi-employer pension plans joined such plans prior to 1980. Thus, at the time they agreed to such plans there was no withdrawal liability.

As to the underfunding of the plans, public warehousemen were neither, because of their small size and collateral relationship to the trucking industry, negotiators who established the terms of the plan nor trustees who decided issues of investments and benefits. Also, unlike the trucking industry, warehousemen have not experienced a high rate of business failure or bankruptcy with resultant losses to the pension fund.

Despite the fact that warehousemen were not the precipitating cause of the underfunding problem, they are entrapped in the legislative solution.

Family owned businesses which are the retirement nest egg of elderly owners cannot be sold, or if sold, must be discounted in value because of the withdrawal liability imposed by the statute. Withdrawal liability can occur without an employer's involvement. The employees can change unions and withdrawal liability can be triggered. In that event the employer may also be making contributions to the pension plan of the new union. Partial withdrawal liability can attach where a major account changes its distribution patterns or for a variety of other reasons a warehouse reduces its operations.

None of these effects were contemplated by warehousemen who agreed to multi-employer plans. The appropriation of their capital was not within their bargain.

The AWA submits this brief in the belief that the legislation is an unconstitutional taking of the property of warehousemen who are members of multi-employer pension plans.

SUMMARY OF ARGUMENT

The MPPAA takes the property of warehouse employers without constitutional justification.

ARGUMENT

The withdrawal liability provisions of MPPAA constitute an unconstitutional taking under the taking clause of the 5th Amendment. In order to make a claim under the taking clause, the claimant must prove that property has been taken. Property is defined as "that bundle of rights inhering in the citizen's relation to a physical thing, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945).

Every reported decision concerning the taking clause in a MPPAA case rejects the claimant's argument that the withdrawal liability provisions constitute a taking. The lower court in the case herein found that no property had been taken. Apparently the property was considered to be the employers right to withdraw from a multi employer plan without incurring withdrawal liability.

Regardless of how the property taken is characterized, whether it is the right not to make additional contributions to the multi-employer plan, or whether it is the loss generated by payment of the withdrawal liability as a result of MPPAA withdrawal liability provisions, a withdrawing employer loses an amount equal to its share of the unfunded vested liability in the plan. The employer may not be losing a specific piece of property, but the employer is losing a certain, ascertainable portion of its assets. This is clearly taking of property without just compensation.

To ignore the taking requires the type of analysis undertaken in *Dorn's Transportation, Inc.* v. *I.A.M. National Pension Fund*, 578 F.Supp. 1222, 1235 (D.D.C.-1984). There the Court recognized that contract rights are considered property within the meaning of the taking clause, but found that considerations of public policy justify the taking under MPPAA.

This type of analysis starts with the case of *Nachman* v. *Pension Benefit Guaranty Corporation,* 592 F. 2d 947 (7th Cir. 1979) affirmed on statutory grounds, 446 U.S. 359 (1980).

This case considered the constitutionality of ERISA, the Pension Reform Act of 1974 and a single employer plan to which the employer made contributions until it closed its plant. The 7th Circuit Court of Appeals reversed the district court's summary judgment in favor of the employer request that ERISA imposed no withdrawal liability for unfunded vested liability. The Court held the employer liable and sustained the constitutionality of ERISA. The *Nachman* Court adopted a four point test of constitutionality (592 F.2d 947, 960):

1. Reliance interests of the parties affected;

2. Whether impairment of private interests occurred in an area previously subject to regulatory control;

3. The equities of the burdens imposed; and,

4. The provisions to limit and moderate the impact of the burdens.

The *Nachman* analysis was applied to MPPAA, in *Peick* v. *Pension Benefit Guaranty Corporation,* 539 F.Supp. 1025, (N.D. Ill.-1982), aff'd. 724 F.2d 1247. (7th Cir. 1983). The District Court focused primarily on the reliance and notice issues and found MPPAA constitutional on all points.

This analysis is, however, defective in two key respects. In the first place, it ignores the key difference between a single employer plan where all contributions cease when an employer withdraws and a multi-employer plan where continuity is not necessarily threatened by one employer's withdrawal.

The effect of holding an employer liable for withdrawal liability is to completely unsettle cost expectations that an employer takes away from the bargaining table. When pension

plan contributions are negotiated the employer can make a calculation of costs per hour. In the typical multi-employer plan, the employer agreed to make contributions, but disclaimed liability for plan administration, performance or benefits. The employer had no control over asset performance in the market place, but now with MPPAA, he is liable for unfunded vested liability.

In the second place, the *Nachman* analysis ignores the traditional tests of public purpose, necessity and responsibility.

These tests have been the subject matter of at least two Supreme Court decisions. One of these is *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), where the Court upheld a congressional act granting new benefits to retired miners suffering from black lung disease. The other case is *Allied Steel* v. *Spannaus*, 438 U.S. 234 (1978), where the Court rejected a Minnesota statute which provided for vesting of a pension after 10 years of employment while the employer's plan provided for 15 year vesting. The Court cited the following language from an earlier opinion in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, (1977): "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption". (431 U.S. 1, 22).

The difference in result in these cases appears to be necessity. The black lung problem justified the imposition of a new, unbargained for burden. The conditions which caused black lung was generally within the knowledge and control of the persons upon whom liability was imposed. The performance of the pension funds was not generally within the control of those upon whom liability was imposed.

The other point in *Peick* deserves consideration. The trial judge gave a great deal of emphasis to the view that a field once the subject of regulation is always subject to more extensive regulation. This prior regulation with ERISA and Taft-Hartley

was notice to employers that Congress intended to be involved in the private pension system (*Peick,* 539 F.Supp., at P. 1044-45).

Holding as the court did in *Peick* that once regulation has begun, more will follow and the employer must have known that it would be forthcoming by imposing a huge liability on a withdrawing employer does not adequately assess the relative burdens of the involved regulation. Clearly a modest, reasonable regulation does not automatically justify the unforeseen, Draconian solution of withdrawal liability.

MPPAA takes the property of warehouse employers and such taking is outside of accepted constitutional standards.

CONCLUSION

For the foregoing reasons we submit that the decision of the United States District Court for the Central District of California, Three Judge Court, is erroneous, and that this Court should find that the withdrawal liability provisions of the Multi Employer Pension Amendment Act of 1980 are unconstitutional.

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BRIEF OF THE TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1950 AND 1974 PENSION PLANS AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF THE AMICI CURIAE

Amici are the Trustees of the United Mine Workers of America ("UMWA") 1950 and 1974 Pension Plans ("1950 Plan" and "1974 Plan," and collectively "Plans"), two multiemployer pension plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1001 *et seq.* (1982). The Plans are maintained under collective bargaining agreements between the UMWA and the

Bituminous Coal Operators' Association, Inc. ("BCOA"), other employer associations, and independent employers, all engaged in coal mining or other coal-related businesses. The Plans are among the largest multiemployer plans in the nation. They pay pension benefits to more than 126,000 retired and disabled coal miners, or their widows. There are more than 88,000 active participants in the 1974 Plan.

The Plans are a continuation of one of the first collectively-bargained multiemployer plans. That plan came into existence in 1946, through negotiations between the UMWA and the federal government, which had seized the nation's coal mines under emergency powers. *See* 26 U.S.C. § 404(c) (1982 & 1983 Supp.); 26 C.F.R. § 1.404(c)-1(b)(1985). For most of its existence, that plan was known as the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund").

In the decades that followed the Second World War, the number of jobs in the coal industry declined precipitously, particularly in the unionized sector. See *Roark v. Boyle* , 439 F.2d 497, 506 (D.C. Cir. 1970). As befitted a plan in an industry with a declining job base and undergoing mechanization, contributions to the 1950 Fund were based on units of production, *i.e.*, tons of coal mined. *Id.* at 505. Although the per-ton contribution rate was set by the National Bituminous Coal Wage Agreement ("Wage Agreement"), *id.*, contributions did not always keep pace with current benefit obligations, much less allow a reserve to be established for future obligations. Consequently, the 1950 Fund was operated on a "pay-as-you-go" basis and, like many plans of that era, did not promise vested benefits. *Id.*; see also *Short v. UMWA 1950 Pension Trust*, 728 F.2d 528, 537-38 (D.C. Cir. 1984).

The Trustees of the 1950 Fund were given full discretion, by the bargaining parties, to set and alter eligibility requirements and benefit levels. See *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 565 and *id.* n.2 (1982). As production slackened and the number of retirees increased,[1] the Trustees

[1]The situation was exacerbated by the fact that tens of thousands were added to the retirement rolls as a result of numerous court decisions or class action settlements that forced the Trustees to liberalize the eligibility requirements. *E.g.*, *Roark v. Boyle*, 439 F.2d 497; *Pete v. UMWA Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) (*en banc*); *Blankenship v. UMWA Welfare and Retirement*

repeatedly were forced to tighten eligibility requirements or reduce benefits to prevent a shortfall . Nevertheless, by 1974, when ERISA was enacted, the 1950 Fund was severely underfunded.

ERISA imposed minimum vesting and funding requirements on pension plans for the first time. 29 U.S.C. §§ 1053, 1081 *et seq.* Because of that fact, the UMWA and the BCOA, confronting billions of dollars in unfunded vested benefits, recognized that the industry's pension program would have to be completely overhauled. Toward that end, the bargaining parties replaced the 1950 Fund with two separate Plans in the 1974 Wage Agreement.

The 1950 Plan was established to cover only those who were already retired or would retire before the effective date of ERISA. The 1950 Plan would therefore not accrue any substantial liabilities for future service. The Plan, however, inherited $1.7 billion in past service liabilities and only $49 million in assets from the 1950 Fund. The 1974 Plan was established to cover those who would retire after the effective date of ERISA. The Plan inherited no assets and $1.6 billion in past service liabilities. See *Calvert & Youngblood Coal Co. v. UMWA 1950 and 1974 Pension Plans* (hereinafter "*Calvert* "), 5 EBC 2361, 2363 (1984) (Polak, Arb.), *enforced*, 6 EBC 1106 (N.D. Ala. 1985).

To strengthen these new Plans, the bargaining parties increased the per-ton contribution rates. They also agreed, for the first time, to a contribution on man-hours.[2] More important, to control the growth of benefit obligations, they incorporated specific eligibility requirements and benefit levels in the 1974 Wage Agreement, rather than continuing to leave such matters to the Trustees' discretion. See *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. at 566-67.

Despite these changes, however, the Plans soon began to suffer renewed financial difficulties. Contributions fell below

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Fund of 1950, Nos. 2186-69 and 2350-69 (D.D.C. February 26, 1973) (order approving settlement).

[2]These contributions were allocated among the two Plans and two sister plans that provided welfare benefits. The 1950 Fund had previously provided both pension and welfare benefits.

expected levels because coal production was curtailed by unauthorized work stoppages and harsh winters. See *Allen v. UMWA 1979 Ben. Plan and Trust*, 4 EBC 1349, 1352 (S.D. Ind. 1983), *aff'd*, 726 F.2d 352 (7th Cir. 1984); *Caudle v. UMWA*, 523 F.Supp. 91, 93 (N.D. Ala. 1981). Consequently, the bargaining parties had to reallocate future contribution income to the two Plans from one of the welfare plans several times during the term of the 1974 Wage Agreement. See *Caudle v. UMWA*, 523 F.Supp. at 93-94.

Nevertheless, the financial difficulties mounted. When the 1974 Wage Agreement expired in December, 1977, the 1950 Plan was unable to pay benefits for several months during a 111-day strike that followed. Later, the Plan had to take out a bank loan to make up the missed payments. See *Palmer Coking Coal Co. v. UMWA 1950 and 1974 Pension Plans* (hereinafter "*Palmer*"), 5 EBC 2369, 2371 (1984) (Gordon Arb.), *complaint to modify, and as modified to enforce*, No. 84-3407 (D.D.C. filed November 7, 1984).

The strike was settled by the execution of the 1978 Wage Agreement. In that Agreement, the bargaining parties made further efforts to shore up the Plans. They once again increased the contribution rates. And, with the strike freshly in mind, the employers agreed to "fully guarantee" benefits during the term of the Agreement and to increase the contribution rates in mid-term if necessary.

Nevertheless, because their assets had been depleted by the earlier strike, when no contributions were made, the Plans continued to be very poorly funded throughout the 1978 Wage Agreement. See *Palmer*, 5 EBC at 2371; *Calvert*, 5 EBC at 2363-64. At the beginning of the 1978 Wage Agreement, the 1950 Plan actually had no assets, and indeed owed the money it had borrowed to continue benefit payments. See *Palmer*, 5 EBC at 2371. And, the 1974 Plan would have failed to comply with the minimum funding standards, except for a special accounting technique, authorized by IRS regulations, that allowed it to "borrow" future contributions. See *id.*; *Calvert*, 5 EBC at 2364-65.

On the eve of MPPAA's enactment in 1980, the 1950 Plan was among the worst funded multiemployer plans in the nation, and the 1974 Plan was very poorly funded in comparison to

most plans. *Calvert*, 5 EBC at 2363, 2364.[3] Indeed, the specter of the 1950 Plan terminating was the single greatest potential threat to the PBGC's insurance program. These facts were not lost upon the PBGC or the Congress. See 126 Cong. Rec. S10104-06 (daily ed. July 29, 1980) (remarks of Sen. Randolph). Consequently, Congress was attentive to the concerns of the UMWA and the BCOA over the precarious position of the coal industry Plans. Both of these parties endorsed an amendment to prevent withdrawing employers from dumping all of a plan's liabilities on the employers that remain.

In this respect, BCOA president Joseph Brennan testified that withdrawal liability was a means to assure that employers "cannot withdraw from a continuing plan and shift their liabilities to the remaining employers. Such an amendment is necessary for the future viability of pension plans, as the law currently provides an incentive for employers to withdraw from a multiemployer plan, thereby reducing the funding base." *Proposed Amendments to ERISA Regarding Multiemployer Pension Plans: Hearings Before the Pension Task Force, Subcomm. on Labor-Management Relations, Comm. on Education and Labor, United States House of Representatives* (hereinafter "*Hearings*"), 96th Cong., 1st Sess. 825 (1979).

This theme was repeated by UMWA economist Donald Pierce, who noted that each of the Plans had close to $2 billion in unfunded vested benefits (" UVB ").[4] In recognition of that fact, Pierce went on to conclude that "[i]t is imperative that existing participating employers in multiemployer plans be kept in the fold," so that "an ever increasing liability is not added to those employers who remain with the plan while others abandon the plan." *Hearings* at 863.

After consideration of the concerns expressed by the UMWA and the BCOA, Senator Randolph forcefully reviewed

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[3] When MPPAA's "reorganization" provisions became effective for underfunded plans in serious jeopardy, the 1950 Plan was immediately cast into reorganization status. Under reorganization, a plan must be funded at a faster rate, contributions may be increased, and benefit increases may be cancelled. 29 U.S.C. §§ 1423, 1425.

[4] UVB is the actuarial present value of vested benefits minus the value of plan assets. 29 U.S.C. § 1393(c).

the historic plight of the Plans and characterized withdrawal liability as a form of "relief to responsible employers who attempt to weather any severe economic difficulties the plan may face." "By encouraging all employers to continue their obligations and bear their fair share of the plan's responsibilities," he continued, "the likelihood is lessened that the severe economic pressures [on remaining employers, on plans and on the PBGC] envisioned in the bill will ever be reached." 126 Cong. Rec. at S10105.

Based on the foregoing, it is clear that not all employers in the coal industry are opposed to withdrawal liability. Far from it. To those employers who are financially responsible and have remained with the Plans, withdrawal liability assures that those who have withdrawn, and who have availed themselves of the benefits of these multiemployer plans, will bear their fair share of the funding burden.[5] Absent that protection, the burden will fall to fewer and fewer, until those remaining find it intolerable. Obviously, this fact was not lost upon the BCOA, which testified in support of withdrawal liability.

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[5]Among the benefits to employers, multiemployer plans provide for a pooling of employer contributions, so that employers share the cost of providing pensions to their employees. *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 582 F.Supp. 301, 303-04 (D.D.C. 1983) (hereinafter "*Washington Star*"), *aff'd*, 729 F.2d 1502 (D.C. Cir. 1984). Multiemployer plans also have lower administrative costs and greater pools of assets, and, hence, more investment options than single employer plans. And, they frequently allow for past service credit for periods before an employer was a contributor, *Washington Star*, 582 F.Supp. at 303; see 29 U.S.C. § 1053(b)(1)(C), and must allow for portability of service credit, 29 U.S.C. § 1053(b)(1), 29 C.F.R. § 2530.210(c)(1) (1985), which is particularly important in an industry where employees are often required by economic conditions to change employers. Because of these features, a multiemployer plan is a plan "the employer might himself have established in his own economic interest." They assure a "trained and reasonably contented labor supply," which is "an asset to the employer." *Roark v. Boyle* , 439 F.2d at 506. *Accord Washington Star*, 582 F.Supp. at 303-04; *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, ____U.S. ____, 105 S.Ct. 2116 (1985).

A more obvious benefit to the employer is that contributions to such a plan are tax deductible. 26 U.S.C. §§ 401(a), 404(a)(1), 501(a).

Moreover, terminations of large, poorly funded multiemployer plans could overwhelm the PBGC's insurance program, and ERISA's promise of vested benefits would then be hollow indeed. And, despite the generalizations cited by *amicus* National Association of Manufacturers ("NAM") at pages 7-11 of its Brief, many large plans are very poorly funded and employer withdrawals can significantly damage their contribution base.[6]

In the six years preceding MPPAA, the 1950 Plan was on the average only 3% funded and the 1974 Plan was only 19% funded. See *Palmer*, 5 EBC at 2371. And, since the enactment of MPPAA, the Plans' employer base has declined from almost 2,300 to less than 1,600, as a result of employer withdrawals. Those employers' share of the Plans' underfunding, assessed as withdrawal liability claims, totals over $130 million, which would otherwise have been borne by the remaining employers.

This liability should not be viewed as a penalty; it is simply a cost of doing business. While the business decisions regarding pension plan participation may be hard, they certainly exist to be made. Indeed, a substantial number of employers in the coal industry have joined with the UMWA to act in a responsible

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[6] The GAO Study cited by NAM itself states that "the smaller plans were generally better funded than the larger plans in the sample," that 24 of the 91 plans in the sample were less than 50% funded and had low ratios of assets to benefit payments, that such plans have a "high potential for insolvency" and without withdrawal liability could pose a threat to the PBGC insurance program, and that withdrawal liability provides "increased financial protection for the plans" and "a measure of protection against insolvency of the [insurance] program." GAO, *Report to the Congress, Effects of Liabilities Assessed Employers withdrawing from Multiemployer Pension Plans* 8, 11 (1985).

Indeed, a contemporaneous GAO report on a related subject concludes that 14 large financially distressed plans alone had UVB that were 149 times the assets of the PBGC insurance program and that those plans "could not withstand further financial deterioration without posing a substantial risk to the insurance program." GAO, *Report to the Congress, The 1980 Multiemployer Pension Plan Amendments Act: An Assessment of Funding Requirement Changes* 18 (1985).

partnership to control underfunding, by agreeing not only to contribution levels but to eligibility requirements and the level of benefits. Some employers, however, have decided to withdraw from the Plans. A substantial number of these withdrawals have occurred at the end of a collective bargaining agreement. This can only mean that these employers have made a business decision to operate non-union or to go into a different line of business. *E.g., Combs v. Adkins & Adkins Coal Co.*, 597 F.Supp. 122, 126 (D.D.C. 1984) (employer reconstituted as a "non-union shop"). Every business decision has costs as well as benefits, however, and withdrawal liability is the cost of promising employees vested pensions that have not been fully funded.

Furthermore, ERISA itself provides many ways to structure a business transaction so that it does not result in the imposition of withdrawal liability or the depletion of a plan's contribution base. *See* 29 U.S.C. § 1384 (sale of assets to contributing employer does not result in imposition of withdrawal liability where, *inter alia*, purchaser posts a bond);[7] § 1398(1), *incorporating by reference* § 1362(d) (mergers, spinoffs and other corporate reorganizations do not constitute withdrawals where successor corporation is a contributing employer); *Joint Explanation of S. 1076: Multiemployer Pension Plan Amendments Act of 1980*, 126 Cong. Rec. S10115 (daily ed. July 29, 1980) (sale of stock does not result in withdrawal); PBGC Opinion Letter 82-17 (May 26, 1982) (same). *Cf.* 29 U.S.C. § 1415 (employer entitled to reduction of withdrawal liability where assets and liabilities are transferred to another multiemployer plan following a change of collective bargaining representative).

Moreover, an employer contemplating withdrawal has the right to have the plan calculate his potential withdrawal liabil-

[7] The PBGC has been given authority to vary the bonding requirement 29 U.S.C. § 1384(c), and PBGC has granted a waiver of that requirement on a class-wide basis where the transaction is *de minimis* or the purchaser is financially responsible. 29 C.F.R. § 2643.10 *et seq.* (1985). PBGC has also granted many individual waivers. *E.g., U.S. Steel Mining Co., Inc.*, 49 Fed. Reg. 9037 (March 9, 1984)(noting that the sale of assets rules in 29 U.S.C. § 1384 should be administered "in a manner that assures protection of the plan with the least practicable intrusion into normal business transactions").

ity so that he can make an informed decision. 29 U.S.C. § 1401(e). And, if an employer that has withdrawn decides to reenter the plan, he may have his withdrawal liability abated. *Id.* § 1387; *see* PBGC Prop. Reg. § 2647.1 *et seq.*, 49 Fed. Reg. 8036 (March 5, 1984).

In short, like minimum wage laws, worker's compensation laws and other statutory impositions in the labor field that require payment for value received or damage done, withdrawal liability is a cost of doing business, and a cost that, through proper planning, can be minimized or avoided altogether. And, where an employer is subject to withdrawal liability, its liability is payable in quarterly or monthly installments that approximate its prior contribution history, 29 U.S.C. § 1399(c)(1)(C)(i), (c)(3), assuring no greater business costs upon the withdrawn employer than before the withdrawal.[8]

Based on these considerations, these *amici* believe it is clear that withdrawal liability is a reasonable legislative response to a perceived problem of great importance, and one that provides for rational cost-spreading among the parties involved. As such, it comports with the Due Process Clause and does not implicate the Takings Clause.

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[8] Withdrawal liability, which is "based on the withdrawn employer's contribution history to the plan," provides for "continued funding by the withdrawn employer in line with its previous contributions so as to make the liability an annual business cost." H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 82-83 (1980); see also *Senate Comm. on Labor and Human Resources, The Multiemployer Pension Plan Amendments Act of 1980: Summary of Analysis and Consideration*, 96th Cong., 2d Sess. 20-21 (Comm. Print 1980).

SUMMARY OF ARGUMENT

Last Term, this Court upheld the retroactive imposition of withdrawal liability as a rational measure "adjusting the burdens and benefits of economic life." *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, ____ U.S. ____, 104 S.Ct. 2709, 2717 (1984). Such legislation is appropriately analyzed under the Due Process Clause and not under the Takings Clause.

The imposition of withdrawal liability does require an employer to part with money. But that fact is hardly dispositive of whether MPPAA implicates the Takings Clause. This Court has upheld, on due process grounds, numerous regulatory statutes that require money to be paid for public purposes, such as statutes establishing mandatory insurance programs. Thus, regulatory statutes generally do not implicate the Takings Clause.

Even assuming otherwise, an employer does not have a reasonable "investment-backed expectation" that an agreement that purports to limit his obligation to fund promised pension benefits will not be modified by Congress. Collective bargaining agreements are subject to numerous federal statutes, and it is well settled that the legislature may modify an agreement to achieve a legitimate end. ERISA, a "comprehensive and reticulated" statute, left no doubt that promised pension benefits must be funded, despite contrary provisions in collective bargaining agreements. Nor is withdrawal liability akin to a "physical invasion" or to an interference with contract rights pertaining to specific property.

Like many other federal statutes, MPPAA merely requires employers to pay money for value received or damage done. To say that an employer who has incurred withdrawal liability must be compensated therefor would be effectively to compel the government to "regulate by purchase," and government could not continue if that were so.

ARGUMENT

MPPAA's imposition of withdrawal liability is a regulation of the burdens and benefits of economic life and, as such, does not implicate the Takings Clause.

MPPAA has been the subject of extensive constitutional litigation in the lower courts almost since its enactment.[9] Last Term, however, this Court unanimously held that the retroactive imposition of withdrawal liability did not violate the Due Process Clause.[10] *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, ____ U.S. ____, 104 S.Ct. 2709 (1984). There, the Court upheld the imposition of withdrawal liability for withdrawals that occurred during the 5-month period before MPPAA was enacted, as a rational measure "adjusting the burdens and benefits of economic life." *Id.* at 2717, *quoting from Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Although the Court merely assumed that MPPAA was valid prospectively, *id.* n.7, it used the same test in analyzing its retroactive application: whether it was "justified by a rational legislative purpose." *Id.* at 2718.

These *amici* submit that, as legislation adjusting the burdens and benefits of economic life, MPPAA is appropriately analyzed under the Due Process Clause and not under the Takings Clause. To be sure, withdrawal liability requires an employer to part with money. But it would be a misreading of

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[9] The Courts of Appeals and District Courts have uniformly rejected challenges to MPPAA based on the Takings Clause. *E.g.*, *Terson Co. v. Bakery Drivers & Salesmen Local 194*, 739 F.2d 118 (3d Cir. 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3553 (1984); *Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3554 (1984); *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396; *Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund*, 578 F.Supp. 1222 (D.D.C. 1984), *aff'd mem.*, 753 F.2d 166 (D.C. Cir. 1985); *Speckman v. Paddock Chrysler Plymouth, Inc.*, 565 F.Supp. 469 (E.D. Mo. 1983). If not for the fact that this case was heard by a three-judge court, it is unlikely that the issue would have merited this Court's attention. *See* U.S. Sup.Ct. Rule 17.1(a), 28 U.S.C.A. (1984).

[10] U.S. Const. Amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), to conclude that a statute that requires a person to pay money is a "taking" of his "property," within the meaning of the Takings Clause.[11]

In *Webb's*, a state statute allowed a court clerk to withhold the interest earned on an interpleaded fund when he returned the proceeds to its owners. This Court found that, although under a separate statute the clerk could charge a fee for services rendered in connection with the fund, there was no separate police power justification or reasonable basis for the appropriation of interest. 449 U.S. at 163-64. Therefore, "under the narrow circumstances" of that case, there was an unconstitutional taking of property. *Id.* at 164-65.

But the fact that a statute requires a person to pay money is hardly dispositive of whether it implicates the Takings Clause. Justice Holmes was surely stating the obvious when he said that "[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), *quoted with approval in Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (hereinafter "*Penn Central*"). If it were otherwise, government could not even raise revenue through taxation. *Penn Central*, 438 U.S. at 124. Accordingly, this Court has upheld, on due process grounds, statutes that require money to be paid for various public purposes, *e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (minimum wage); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (mandatory workers' compensation insurance); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911) (mandatory deposit insurance), to say nothing of the cases where it has upheld alleged "takings" on police power grounds in a more traditional eminent domain context. *E.g.*, *Penn Central*, 438 U.S. 104 (historic district zoning); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (nuisance abatement).

Indeed, this Court has long recognized that regulatory statutes are amenable to review only on due process grounds, provided, in Justice Holmes's words, they do not "go too far."

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[11] U.S. Const. Amend. V (". . . nor shall private property be taken for public use, without just compensation").

(*Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.) *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, ____U.S. ____, 105 S.Ct. 3108 (1985); *United States v. Locke*, ____U.S. ____, 105 S.Ct. 1785 (1985); *Andrus v. Allard* , 444 U.S. 51 (1979); *Penn Central*, 438 U.S. 124; *Goldblatt v. Town of Hempstead*, 369 U.S. 590; *Noble State Bank v. Haskell*, 219 U.S. 104.

Whether a statute crosses the line between regulation and a taking of property involves "essentially ad hoc , factual inquiries." *Penn Central*, 438 U.S. at 124. But a taking of property is more likely to be found where the statute interferes with "distinct investment-backed expectations" and where the government has effected a "physical invasion," as distinct from a "public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*

An employer does not have a reasonable "investment-backed expectation" in the sanctity of a collective bargaining agreement that purports to limit his obligation to fund the pensions that he has promised to his employees. It is a well accepted principle that contracts are subject to supervening law.[12] For example, collective bargaining agreements are subject to federal minimum wage laws, workplace health and safety laws, equal employment opportunity laws, and laws protecting returning veterans. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. at 575-76. And, agreements may be modified by the legislature where necessary to achieve a legitimate end. *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934); *Block v. Hirsch*, 256 U.S. 135 (1921); *Calhoun v. Massie*, 253 U.S. 170 (1920).

In a like manner, ERISA left no doubt that promised pension benefits must be funded and that an employer had potential liability for an underfunded plan, despite a contrary provision in its collective bargaining agreement. *E.g.*, *Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d at 1272;

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[12]The federal government is not limited by the Contract Clause, U.S. Const. Art.I, § 10, cl. 1. *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 104 S.Ct. at 2719-20 n.9. For Takings Clause purposes, governmental action to void a contract is not compensable. *Compare Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), *with Brooks Scanlon Corp. v. United States*, 265 U.S. 106 (1924).

Dorn's Transp. Co. v. I.A.M. Nat. Pension Fund, 578 F.Supp. at 1235-36; *see Nachman Corp. v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). In light of this "comprehensive and reticulated" legislative scheme, *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. at 361, employers can hardly complain that the withdrawal liability amendments upset reasonable "investment-backed expectations." *Cf. Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2875-77 (1984) (where holder of trade secret submitted it to government at time when statute allowed government to disclose it to others, such disclosure did not constitute a taking because holder was on notice of government's authority).

Nor is withdrawal liability akin to a "physical invasion," *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or even to an interference with contract rights pertaining to specific property. *See, e.g., Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien); *see also United States v. Security Industrial Bank*, 459 U.S. 70 (1982) (lien on household goods; decided on statutory grounds). At bottom, the contracts involved here provided nothing but a hope of being able to "escape one's liability in derogation of statutory policies." *Dorn's Transp. Inc. v. I.A.M. Nat. Pension Fund*, 578 F. Supp. at 1235-36; *accord Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d at 1276. In the context of the already pervasive regulation of the field, that was not a cognizable interest under the Takings Clause.

Statutes frequently require payment of money as a *quid pro quo* for value received or damage done. For example, the Federal Coal Mine Health and Safety Act of 1969, as amended, requires coal operators to provide black lung benefits to their former employees, even those whose employment ended before the enactment of the statute. In holding that the Act passed constitutional muster, this Court reasoned that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labors—the operators and the coal consumers." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 18. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155

(government charges fees for services); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) (unemployment compensation funded by tax on employer); *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917) (employer relieved of common law liability for worker's injury in exchange for providing specified compensation for injury without regard to fault).

As this Court said in *Noble State Bank v. Haskell*, 219 U.S. 104, where it upheld mandatory deposit insurance, the "share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." *Id.* at 111. *Accord American Savings & Loan Assoc. v. County of Marin*, 653 F.2d 364, 372 (9th Cir. 1981), *citing Agins v. Tiburon*, 447 U.S. 255, 262 (1980). Here, employers gained the benefit of an experienced and contented workforce by promising vested pensions, and were able to pool the costs and risks of doing so by participating in a multiemployer plan. See n.5, *infra*. To say that more compensation was due them in return for their obligation to fund the plan would be "effectively [to] compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. at 65 (emphasis in original).

CONCLUSION

Upon the foregoing, the decision of the District Court was correct and in accordance with law, and should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLEE, PENSION BENEFIT GUARANTY CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 84-1555 & 84-1567

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLEE, PENSION BENEFIT GUARANTY CORPORATION

The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support

of Appellee. Copies of letters written by counsel for Appellant and Appellee granting the parties' consent to this submission are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), pursuant to the written consent of the parties, submits this brief urging affirmance of the decision of the Three Judge Court below sustaining the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA")[1] against attack under the Takings Clause of the Fifth Amendment to the Constitution and also sustaining the multiemployer pension insurance program, including the imposition of premiums, against constitutional attack. The NCCMP is a tax-exempt, non-profit corporation organized to represent the interests of the more than eight million workers who participate in collectively bargained multiemployer plans. The NCCMP's affiliates include over 140 multiemployer plans and related international unions. Its affiliates together represent the great majority of the participants in multiemployer plans.

The NCCMP actively participated throughout the development and Congressional consideration of the MPPAA. It is our belief that such legislation, including the provisions challenged here, is essential to the stability of multiemployer pension plans and to the viability of the federal pension benefit guaranty program established by Title IV of ERISA. If the Three Judge Court's decision is not sustained we are concerned that the result

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[1] Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (1980). The withdrawal liability provisions of the MPPAA, which added Sections 4201 through 4225 to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), are codified at 29 U.S.C. §§ 1381-1405.

will be to disrupt severely the operation of multiemployer pension plans and endanger the retirement security of millions of American workers who participate in them.

SUMMARY OF ARGUMENT

The imposition of withdrawal liability is not a taking of property, but a consequence of permissible Congressional regulation of "the benefits and burdens of economic life."

The MPPAA was enacted to counteract a real threat to the vitality and stability of our system of private multiemployer pension plans. The Act distributes the burden of preserving the system equitably among all participants, and the manner of regulation chosen by Congress is rationally related to the legislative purpose.

The enactment of the MPPAA has not only affected employers withdrawing from multiemployer plans. In addition, multiemployer plans must pay increased premiums which are necessary to preserve the PBGC financial guaranty program, and plan participants must accept lower guarantees and reduced benefits in the event of a plan termination.

The Court's analysis of cases under the Takings Clause is similar to the approach it has taken in Due Process Clause cases. Congress has substantial power to regulate for the public good, and economic legislation, such as that being challenged here, is to be viewed with a presumption of constitutionality. So long as Congress has legitimate objectives it has the power, even with respect to "vested property rights," to impose new regulatory constraints on the way in which those rights are used. Moreover, even where property has been severely diminished in value, the Court has consistently held that no taking has occurred where, as here, the governmental action was to promote "health", "safety", and "morals" or "the general welfare".

In addition to analyzing the character of the governmental action at issue, the Court also considers the economic impact of the regulation and the "interference with investment-backed expectations." In this case there has been no disproportionate economic impact; employers, employees and the plans themselves are all affected by the regulation. And, the "investment-backed expectations" which Appellants seek to protect is—when all is said and done—the right of employees to abdicate any responsibility to the plan without incurring liability. Surely, the Fifth Amendment was not designed to protect such an interest.

To say that the imposition of withdrawal liability is a taking would eviscerate Congress' power to legislate for the public welfare.

ARGUMENT

THE WITHDRAWAL LIABILITY PROVISIONS OF THE MPPAA ARE ESSENTIAL TO THE STABILITY OF MULTIEMPLOYER PLANS AND THE VIABILITY OF THE FEDERAL BENEFIT GUARANTY PROGRAM AND THEIR ADOPTION AS PART OF A COMPREHENSIVE MEASURE TO FOSTER THOSE OBJECTIVES DOES NOT VIOLATE THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

The evolution of the Court's application of the Takings Clause to the facts of American economic life demonstrates a fundamental understanding that government's role in our society is to govern. Government cannot perform this function without every member of our society understanding that the benefits of our democracy must be paid for; no liberties are complete nor does anyone have property rights which are totally unfettered.[2] As one learned commentator has noted, gov-

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[2] Chief Justice Hughes put it best in *West Coast Hotel Co. v. Parrish*, 300 U.S. 386, 391 (1937):

> What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the

ernment "mediates the disputes of various citizens and groups within the society . . . ." [3] Acting to resolve conflicts between competing alternatives,

> [government] says, as between neighbors, that one fellow must cease keeping pigs in his backyard or must cease making bricks at a certain location; as between management and labor it imposes a duty of collective bargaining; as between tenant and landlord it may adjust prices or impose certain standards for health and safety. The essence of [the government] function is that government serves as an arbiter, defining standards to reconcile differences among the private interests in the community.[4]

And, in analyzing the role of the Takings Clause that same commentator has concluded that "losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power." [5]

The Court has itself made clear that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Indeed, the Court has "recognized in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Central Trans-*

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deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.

[3] Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 63 (1964).

[4] *Id.* at 62.

[5] *Id.* at 62, 63.

portation Co. v. City of New York, 438 U.S. 104, 124 (1978). And, most recently, the Court has stated that

> [e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

United States v. Madison D. Locke, 471 U.S. ——, 105 S.Ct. 1785, 1797 (1985). Moreover, just as in its analysis of alleged "Due Process" violations where the Court has established that "legislative Acts adjusting the burdens and benefits of economic life [are to be viewed] with a presumption of constitutionality . . .", *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), it is apodictic that for purposes of constitutional review under the Takings Clause,

> vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life.

Locke, supra, 105 S.Ct. at 1798.

Rather than establish a "set formula" for determining when a statute is rendered unconstitutional under the Takings Clause, the Court has articulated its preference to reach its judgment based upon "essentially, ad hoc, factual inquiries . . . ." *Penn Central, supra*, 438 U.S. at 124. Examination of the withdrawal liability provisions of the MPPAA and the Congressional rationale underlying their enactment demonstrates beyond a doubt that the constraints and duties which the statute imposes constitute a "reasonable restriction designed to further legitimate legislative objectives", that the statute is de-

signed to adjust and "redistribute the benefits and burdens of economic life", and that the legislative objective was carefully designed to "regulate for the public good." *Locke, supra*, 105 S.Ct. 1798. In meeting those tests there can be no question that the statute withstands Appellants' Takings Clause challenge.[6]

A. The Stability of Multiemployer Plans and the Viability of the Federal Benefit Guaranty Program Was Threatened By the Incentives for Withdrawal and Plan Termination Created by ERISA's Original Title IV Provisions.

1. *The Vulnerability of Multiemployer Plans and the Federal Benefit Guaranty Program.*

ERISA's enactment in 1974 established a comprehensive national policy to foster the financial soundness of private pension plans and to safeguard the benefits earned by participants in such plans. *See, e.g.*, 29 U.S.C. § 1001. Within a few years of ERISA's adoption, however, it had become clear that this policy was in serious jeopardy insofar as multiemployer plans and their eight million participants were concerned.

The financial crisis facing multiemployer plans was analyzed in a comprehensive report submitted to Congress by the PBGC in 1978 (the "PBGC Multiemployer Study")[7] and by numerous witnesses appearing during

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[6] The Court is already familiar with much of the foregoing analysis by virtue of its decision upholding MPPAA's retroactive withdrawal liability provisions on Due Process grounds in *PBGC v. R. A. Gray Co.*, —— U.S. ——, 104 S.Ct. 2709 (1984). Nonetheless, it is necessary to revisit the history of MPPAA and its overall statutory structure for purposes of a Takings Clause analysis here.

[7] The PBGC Multiemployer Study was submitted on July 1, 1978, pursuant to Congress' direction the previous year that the agency prepare a report concerning the anticipated condition of the multiemployer program. Pub. L. No. 95-214, 91 Stat. 1501 (1977). Following submission of that Study, the Administration, on May 3, 1979, sent to Congress its legislative proposals for restructuring the

Congressional hearings. Moreover, the provisions eventually enacted were the subject of lengthy deliberations by four separate Congressional committees, committee reports and floor debates. The extensive legislative record left no doubt that the economic stability of multiemployer plans was in danger and that the benefit guaranty program for multiemployer plans was headed for financial disaster.[8]

A basic element of the problem was that employers could withdraw from a multiemployer plan with no further responsibility for funding the benefit obligations left behind, unless the plan terminated within five years of such withdrawal. The pensions promised to those participants who had worked for a withdrawn employer still had to be honored. However, it was the remaining employers who had to fund the benefits of those participants who had worked for the withdrawn employers. Thus, the withdrawn employers shifted their economic burden from their own shoulders to the employers who stayed loyal to the plan.

Where employer withdrawals thrust sharply increased funding requirements on the remaining contributors, the effect would have been to drive out still more employers

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multiemployer program. Those proposals served as the basis for Congressional hearings and floor debates during 1979 and 1980.

[8] While the guaranty program was made immediately effective for single employer plans in 1974, the effective date for multiemployer plans was delayed until January 1, 1978, due to Congress' acknowledged uncertainty regarding the viability of this program for such plans. The 1978 effective date for the mandatory guaranty program was postponed on several successive occasions in order to provide time for the preparation and Congressional consideration of the PBGC Multiemployer Study and subsequent legislative proposals. *See, Peick v. PBGC ("Peick")*, 539 F. Supp. 1025, 1029-34 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 3554 (1984).

and discourage the entry of new contributors whose participation might otherwise have helped relieve the plan's funding burdens. As discussed below, the PBGC Multiemployer Study reported that this process of employer withdrawal and escalating funding costs to the remaining employers had already imperiled a number of multiemployer plans, and the threat to others was becoming increasingly apparent.

Accordingly, in presenting the Administration's legislative proposals to Congress, the Secretary of Labor, who is the Chairman of PBGC's Board of Directors, identified employer withdrawals and the resulting increased burden on remaining employers as the "key problem" of multiemployer plans.[9] Congress obviously agreed, expressly finding that

> [w]ithdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries . . . .

[29 U.S.C. § 1001a(a)(4)(A)]

The PBGC Multiemployer Study also warned that the existing employer liability provisions of Title IV were fundamentally flawed insofar as they applied to multiemployer plans. Not only would these provisions fail to support the viability of the guaranty program, but they could seriously undermine it by encouraging employer withdrawals and the termination of plans which might otherwise continue in operation.[10]

Under the original Title IV provisions a withdrawing employer would have been absolved of any liability even

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[9] *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate*, 96th Cong., 1st Sess 123 (1979). These hearings are hereinafter cited as "Senate Labor Committee Hearings."

[10] PBGC Multiemployer Study pp. 23-24; *see also* H.R. Rep. No. 889, Part I, 96th Cong., 2d Sess. 54-55 (1980).

if the plan should later terminate—so long as the employer withdrew at least five years before termination. On the other hand, employers who continued to participate in a plan that ultimately terminated would be liable to the PBGC.[11] Thus, once a plan got into financial difficulty, the 1974 law prompted contributing employers to "rush for the door" in the hope of escaping liability that would be triggered by the plan's potential future termination.[12] Moreover, employers who continued funding the plan would be punished while those who failed to continue to fund promised benefits were simply let off the hook.

The PBGC Multiemployer Study also pointed to another unfortunate incentive provided by the original employer liability rules. Since, upon plan termination, the liability of even those employers who remained in the plan could not exceed 30 percent of their net worth, there would be many occasions in which employers would find plan termination to be less expensive than the continuing obligation to make contributions. The fact that many multiemployer plans are established in service-oriented industries where employers can often operate with rela-

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[11] As enacted in 1974, ERISA provided that if a multiemployer plan terminated with insufficient assets to provide benefits at the level guaranteed by the PBGC, the insufficiency would be assessed against employers who had contributed during the five years preceding termination. The insufficiency was to be allocated among those employers on the basis of each employer's proportionate share of the total contributions required under the plan during the five-year period. Thus, the earlier within that five-year period that any employer withdrew, the less would be its proportionate share of total contributions, and therefore, its liability to the PBGC. The Act further provided that an employer's liability would in no event be greater than 30 percent of its net worth. *See*, 29 U.S.C. §§ 1362-1364.

[12] *See* H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 15 (1980); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S.1076).

tively low net worth, made this a very real prospect. Moreover, while active employees and their unions would normally be expected to resist employer pressure to terminate a plan, the knowledge that the PBGC would guarantee substantially all of the benefits earned by retirees could neutralize that resistance—particularly if the result were not only to eliminate contribution payments, but also make that money available to fund higher benefits for current workers.[13]

According to the PBGC's Multiemployer Study, a number of plans were already in serious financial difficulty due to the fact that withdrawing employers had left behind large liabilities which remaining contributors could ill afford to fund. Many of these plans were in industries where such factors as technological advances, foreign competition and changes in consumption patterns had resulted in protracted declines in the number of contributing employers.[14] Were the benefit guaranty program to go into full effect as originally structured, it was clear that significant numbers of those plans would terminate, with the potential of shifting large, uncontrolled costs onto the insurance program. Such increased costs to the pension guaranty system would have to be borne by other multiemployer plans through the payment of drastically increased premiums; those increased premiums would add

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[13] See PBGC Multiemployer Study, pp. 22-23; Statement of National Coordinating Committee for Multiemployer Plans; Senate Labor Committee Hearings, at 190; 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson).

[14] In addition to the analysis provided by the PBGC Multiemployer Study, the difficulties faced by plans in declining industries was discussed at length in the Congressional reports and debates. *See, e.g.*, H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 63 (1980); 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S. 1076).

financial burdens which in turn would make it more difficult for other plans to continue operations.[15]

In view of the problems disclosed by an extensive legislative record, Congress understandably found it essential to eliminate the incentives for employers to withdraw from multiemployer plans and leave others with the burden of funding the benefit obligations they left behind. To accomplish this and other objectives critical to the health and preservation of multiemployer plans it was clear that a substantial revision of existing law was required.

2. *Confirmation of the Threat to Multiemployer Plans and the Federal Benefit Guaranty Program by Representatives of Employers, Labor Unions and Covered Plans.*

Congress was not simply responding to "speculative" predictions of the PBGC Multiemployer Study. The likelihood of multiemployer plan terminations is amply demonstrated by the MPPAA's legislative history.[16] Throughout

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[15] The PBGC Multiemployer Study concluded that multiemployer plans covering 1.3 million workers (15 percent of all multiemployer plan participants) were experiencing financial difficulties that could lead to plan termination before 1988. The cost to the guaranty program of such terminations was estimated to be $4.8 billion. Taking into account only those plans whose insolvency during that period was definitely projected, it was estimated that the guaranty program would incur costs of approximately $560 million. PBGC Multiemployer Study, pp. 2, 15-16, 139-40. As the District Court noted in *Peick*, these projections were based solely on economic data and statistical analyses and did not take into account the additional incentives to terminate that ERISA's original employer liability provisions might provide. 539 F. Supp. at 1031. The Congress also concluded that it was necessary to ensure that presently healthy plans would continue to accumulate sufficient assets to pay their benefit commitments. *Id.* at 1046, n. 41.

[16] It is true that relatively few multiemployer plans had as yet terminated when Congress acted on this legislation. However, the fact is that multiemployer pension plans saw their greatest expan-

the Congressional hearings and subsequent legislative process it was clear that representatives of affected employers, labor unions and multiemployer plans were widely agreed on the danger to multiemployer plans and the Federal guaranty program, absent a major restructuring of the current law.[17] A number of these groups, including the NCCMP, participated in the hearings held by four Congressional committees, and went on record concerning the need for legislative action.

The urgent need for Congressional action was demonstrated by the extensive analysis presented by the NCCMP,[18] which substantiated the PBGC's conclusions. Equally significant, these legislative imperatives were attested to by the ERISA Industry Committee, an association of some 100 major corporations that maintain both single employer and multiemployer plans:

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sion during the 1950's and 1960's; it was some years before certain industries in which these plans had initially flourished began to decline and before the number of retirees reached levels that became burdensome for the plans in such industries. Prior to ERISA, moreover, financially troubled multiemployer plans were able to cope with their difficulties by such means as deferral of funding, reduction of previously-earned benefits and the adoption of more stringent vesting and eligibility rules. Once ERISA foreclosed these options, the financial plight of such plans became more apparent. *See*, PBGC Multiemployer Study, p. 4; and H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 54 (1980).

[17] There were repeated references throughout the legislative process to what Congressman Thompson described as "the support of a broad coalition of labor and management groups representing workers and employers in the industries in which multiemployer plans predominate." 126 Cong. Rec. H3947 (daily ed., May 21, 1980). *See also*, H.R. Rep. 869, Part I, 96th Cong., 2d Sess. 63; and Remarks of Senator Williams, 126 Cong. Rec. S10098 (daily ed., July 29, 1980). Senator Javits, another sponsor of the legislation, cited a list of organizations which were supportive of the provisions Congress was about to adopt. 126 Cong. Rec. S10100 (daily ed., July 29, 1980).

[18] Senate Labor Committee Hearings, pp. 164-227.

> We believe such legislation is essential. Under present law the [PBGC] multiemployer fu[illegible] faces the prospect of several billion dollars of de[illegible]ncy within the early years of automatic cove[illegible]. The unintended consequence of present l[illegible]ould surely go against every principle already [illegible]entified; it would accept, and indeed encourage and reward termination of multiemployer plans, it would drive up premiums enormously, and thereby force more plan terminations, and shrink the premium base; and that, in turn, would inevitably require some form of passing the unmet costs of multiemployer plan insurance to others outside the multiemployer plan universe . . . .[19]

Such testimony from employers and unions most affected by both then-current law, as well as the proposed changes, compellingly confirmed for Congress the conclusion that legislative change was essential.[20] The need for

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[19] *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. 104 (1980). For testimony of other witnesses from industries in which multiemployer plans are prevalent, *see, e.g.*, Senate Labor Committee Hearings at 462 (United Mineworkers of America), at 504 (United Food and Commercial Workers), at 594 (Bituminous Coal Operators Association). *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. (1980), at 89 (Master Contracting Stevedore Association of the Pacific Coast), at 93 (Food Marketing Institute), at 132 (National Construction Employers Council). Each of these employer and labor organizations advocated legislative change and supported the general approach of the PBGC proposals.

[20] This is not to suggest that each witness supported all of the Administration's proposals. When Congressional committee hearings were held on those proposals a number of witnesses, while supporting their basic thrust, nonetheless urged various modifications to eliminate potential inequities or to make them more workable. Consideration of such modifications engaged much of the subsequent legislative process, resulting in a final product which had the endorsement of the organizations listed by Senator Javits, n. 13 at 13, *supra*. *See, Peick*, 539 F. Supp. at 1052, n. 62.

change was particularly evident since support for proposed changes included employer representatives who do not normally welcome legislation imposing new burdens and who, in other legislative contexts, are frequently in opposition to the labor supporters of such measures.

B. The Adoption of Withdrawal Liability Was Part of Congress' Comprehensive Effort to Overcome the Problems Facing Multiemployer Pension Plans and the Federal Benefit Guaranty Program.

The legislation fashioned through three years of study by the PBGC and intensive consideration by Congress represents a painstaking effort to treat, in a comprehensive and balanced fashion, the various factors which threatened the stability of multiemployer plans and the viability of the federal guaranty program.[21] Those provisions, described in detail in Appellee PBGC's brief and in the District Court's opinion in *Peick, supra*, demonstrate the statutory purpose to promote the continuation, rather than the termination, of multiemployer plans by providing for their improved funding, and for the elimination of incentives that encourage employer withdrawal and foster plan decline.

In the process, Congress "spread the pain around." *Peick, supra*, 539 F. Supp. at 1052. Employers who continue to contribute when others withdraw from a plan are relieved of some of the burden of funding the debt of withdrawn employers, a burden with which they had been saddled under ERISA as originally enacted. While the MPPAA shifted a significant part of that burden to withdrawn employers, a portion of the "pain" was also allocated to employee participants who now face lower

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[21] This Court, noting the Congressional finding respecting the adverse effects of employer withdrawals, has described MPPAA as an effort "to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans"—thereby implementing "express congressional policy favoring multiemployer trusts." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 338, n. 22 (1981).

guarantees and the possibility of benefit reductions if their plans are in financial difficulty. And, the entire universe of multiemployer plans will pay, through higher premiums, to support the PBGC's guaranty program.

While Congress determined that certain provisions of the MPPAA, like withdrawal liability, were essential to multiemployer plan stability, it also made every reasonable effort to moderate the impact of the rules. In so doing Congress demonstrated its intent to impose liability "only to the extent necessary to achieve the legislative purpose," thus confirming the rationality of its legislative efforts. *Nachman Corp. v. PBGC*, 592 F.2d 947, 962 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980).

In assessing the impact that any given withdrawal will have on a multiemployer plan, Congress recognized the need to examine the extent to which the plan loses a portion of its contribution base as a consequence of an employer withdrawal. A cessation of an employer's participation that does not involve an erosion of that base—because, *e.g.*, another employer has effectively stepped into the withdrawing employer's shoes—is not likely to have a destabilizing effect.

Although there are enormous practical difficulties in crafting statutory rules to distinguish between the effects of various withdrawals, Congress undertook to make this distinction to the extent possible.[22] One result of that

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[22] The difficulties of formulating statutory provisions that generally distinguish between withdrawals that are harmful to a plan and those that are not are exemplified by 29 U.S.C. § 1383(d). That provision was designed to provide contributors to trucking industry plans an exclusion for withdrawals if "the plan's contribution base does not suffer substantial damage." *See*, 126 Cong. Rec. S11671-72 (daily ed., August 26 1980) (Remarks of Senator Durenberger). Despite the efforts of the legislators to develop a generally applicable statutory test, they could find no alternative but to make the exclusion of any individual withdrawal dependent upon the PBGC, within five years, determining that the plan had not suffered such damage.

effort was the "sale of assets" rule found at 29 U.S.C. § 1384. Under that provision a withdrawal is deemed not to have occurred when an employer ceases to contribute as a result of the sale of its business assets to another party, provided that the purchaser assumes the obligation to contribute to the plan for substantially an equivalent number of employees and meets certain other conditions protective of the plan.

Congress also concluded that in some industries the nature of employment is such that an employer's cessation of contributions is unlikely to reduce a plan's contribution base. It felt sufficiently confident about two such industries—construction and entertainment—to provide special statutory rules. In those two industries, Congress found that contributing employers customarily operate on a project-by-project basis; since employees are generally tied to the industry rather than to a particular employer, an employer's cessation of contributions ordinarily does not adversely affect the plan's contribution base. Accordingly, in those two industries the only event defined as a "withdrawal" is the one that Congress concluded is likely to remove a portion of a plan's contribution base—an employer's cessation of contributions accompanied by its continuation or resumption, within the applicable jurisdiction, of the type of work covered by the plan. 29 U.S.C. § 1383(b) and (c).

One of the most significant moderating provisions applicable to withdrawals—particularly for smaller employers and those whose contacts with a plan have been limited—is the "*de minimis*" exemption. In general, this provision exempts all withdrawal liability amounts under $50,000, and a portion of any amounts between $50,000 and $150,000, thus affecting many withdrawal liability assessments. *See, Peick, supra,* 539 F. Supp. at 1050. In addition, each plan has the option to adopt a higher *de minimis* rule—exempting amounts under $100,000 and reducing amounts between $100,000 and $250,000. 29 U.S.C. § 1389.

Another important feature applicable to all withdrawals—clearly an improvement on ERISA's original liability rules from the standpoint of the employer—is that the MPPAA does not require liability to be paid in a lump sum.[23] The basic rule is that the total amount is to be amortized and paid in installments based on the employer's historic levels of plan contributions. 29 U.S.C. § 1399(c). If more than 20 years are required to amortize such liability on this basis, the payments for the remaining liability are forgiven. In addition to the statutory provisions for amortization of the liability, plan trustees may further adjust the terms of payment pursuant to their broad discretion to "adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability." 29 U.S.C. § 1404.

Other significant moderating features added by the MPPAA include: a general provision permitting the PBGC to prescribe regulations under which plans in other industries may adopt special withdrawal rules similar to the rules applicable to the construction and entertainment industries, 29 U.S.C. § 1383(f); a special net worth limitation on the liability of an employer which sells substantially all of its assets, 29 U.S.C. § 1405(a); the exemption of certain property of a sole proprietor or partner from the collection of liability, 29 U.S.C. § 1405(c); and two changes that help preserve an employer's ability to obtain credit: the tax lien priority the PBGC enjoyed under prior law for termination liability has been eliminated; in addition, the plan has general creditor status only as to 50 percent of the withdrawal liability of an insolvent employer undergoing liquidation, 29 U.S.C.

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[23] The original Title IV rule on employer liability—which still applies to single employer plans—requires its payment in a lump sum. While the PBGC has discretionary authority to grant reasonable terms, its implementing regulation states that it will do so only when necessary to avoid the imposition of a severe hardship, and then only when it appears the employer is able to satisfy those terms and pay the entire liability. 29 C.F.R. 2662.8.

§ 1405(b). Yet another moderating feature allows a plan to be amended to permit a reduction or waiver of liability for a withdrawn employer "which resumes covered operations under the plan or renews an obligation to contribute under the plan." 29 U.S.C. § 1387(b).

C. The Imposition of Withdrawal Liability Was Consistent with the Comprehensive Scheme to Protect the Continuing Viability of Multiemployer Plans.

The concept of withdrawal liability is an integral feature of the MPPAA's comprehensive scheme to protect multiemployer plans and the participants who rely upon those plans for some degree of financial security upon retirement. This Court has left no doubt that, both prospectively and retroactively, the application of withdrawal liability was "itself justified by a rational legislative purpose." *R. A. Gray, supra*, 104 S.Ct. at 2720. That finding of reasonableness is no less determinative with respect to a finding of constitutionality under the Takings Clause here than it was for purposes of the Court's Due Process Clause analysis in *R.A. Gray.*[24] Moreover, as we show below, the statute is fully consistent with other Takings Clause tests which have been fashioned by this Court.

1. *The Character of the Governmental Action.*

In *Penn Central, supra*, 438 U.S. at 124, the Court noted that one of the factors having "particular significance" in Takings Clause cases is "the character of the governmental action." *Id. Penn Central* established that a particular governmental act is far more susceptible to classification as a "taking"

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[24] The Court in *Locke, supra*, grounded much of its opinion on an extensive analysis of the reasonableness of the statutory provisions at issue. It concluded that the regulation of private property rights was not an unconstitutional "taking" "as long as the legislative scheme is *a* rational way of reaching Congress' objectives . . . ." 105 S.Ct. 1800.

> when the interference with property can be characterized as a physical invasion by government, see, *e.g.*, *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 648.

It defies all reason to suggest that ERISA and the MPPAA by their character, or even by operative effect are physically invasive. The statutory outcome in question, *i.e.*, the imposition of withdrawal liability, does not even go so far as those laws and regulations adversely affecting or destroying real property albeit that even that type of regulatory act has been upheld by the Court as reasonably promoting "health", "safety", "morals" or "the general welfare". *See, e.g., Nectow v. Cambridge*, 277 U.S. 183 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). To the contrary, the objectives of the MPPAA are identical to those situations where Congress saw that its failure to act would have a "disruptive effect" on the nation's social fabric and our economic institutions. Thus, just as with Congressionally-mandated prohibitions against racial discrimination in public accommodations, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), or the Congressionally-authorized imposition of the union shop in railway collective bargaining agreements, *Ry. Employees' Dept., A.F.L. v. Hanson*, 352 U.S. 225 (1956), or the Congressionally-mandated imposition of wage, price and rent controls, *Bowles v. Willingham*, 321 U.S. 505 (1944), the imposition of withdrawal liability as part of the MPPAA's overall design to protect the vitality of multiemployer pension plans is simply not unconstitutionally invasive under the Takings Clause.[25]

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[25] Even the total destruction of a business has been held not to be a taking where there is a permissible act or regulation by the

Appellants attempt to obfuscate the character of the governmental action here by concentrating solely on the withdrawal liability provisions of the statute as if to suggest that the assessment of that liability is all that is involved here. But, as we have amply demonstrated above, withdrawal liability is but one element in a carefully crafted regulatory mechanism designed to protect the interests of multiemployer plans, their participants and beneficiaries and those employers who continue to participate in the plans. Withdrawal liability is simply not isolable in the manner which Appellants advocate. In matters such as retirement security which necessarily involve relationships between employers and the employed, "the legislature has necessarily a wide field of discretion . . . that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." *West Coast Hotel, supra,* 300 U.S. at 393. Because the MPPAA is the product of that type of legislative decisionmaking, withdrawal liability and its other ameliorative provisions must be viewed in that wide regulatory context.

2. *The Economic Impact.*

Another factor which the Court has examined in the Takings Clause cases is the "economic impact" of the regulations or statute in question. *Penn Central, supra,* 438 U.S. at 124. Here, too, Appellants would have the Court approach its analysis with tunnel vision. As we have shown, withdrawal liability was not the only economic consequence of the enactment of the MPPAA. Multiemployer plans themselves are required to pay a more

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government, and the impairment or destruction of the business is merely incidental to that act. *See, Mitchell v. United States,* 267 U.S. 341 (1925); *Tempel v. United States,* 248 U.S. 121 (1918) (holding that although the taking of real property is compensable, the destruction of a business incidental to the taking of real property under the Tucker Act is not compensable where the intention to destroy the business is lacking).

than five-hundred percent increase in premiums to support the benefit guaranty program. In addition, plan participants are required to make the sacrifice of accepting lower benefit guaranties in the event of a plan termination. Thus, for the principal purpose of preserving a significant segment of our nation's private system of retirement security, Congress did what it has traditionally done in matters of this nature—it enacted a regulatory scheme which adjusted economic benefits and burdens among all affected groups. None of the regulated parties was singled out for harsher treatment as Appellants suggest. Moreover, it is now well settled that "[w]ithdrawal liability attaches, not as a punishment for the employer's malice or willfulness in withdrawing from the plan, but to protect the vested pension interests of the employees." *Bd. of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1407 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2116 (1985).

Further, the MPPAA does not require an assessment of withdrawal liability without regard to the relationship between the employer and the plan to which he had made contributions. There exists a carefully crafted statutory formula for the calculation of a withdrawn employer's liability which is based upon that employer's actual experience with the plan. 29 U.S.C. § 1391. Moreover, to the extent that there is a dispute between the employer and the plan as to the amount of liability assessed, the MPPAA provides for the impartial arbitration of such disputes. 29 U.S.C. § 1401. And, as has been set forth at length above, there are a plethora of statutory provisions which moderate and mitigate the economic impact of withdrawal liability.

3. *Interference With Investment-Backed Expectations.*

Yet another factor which the Court has examined under the Takings Clause is whether the governmental action at issue has "interfered with distinct investment-backed

expectations." *Penn Central, supra,* 438 U.S. at 124. Inherent in this concept is that the possessors of the "property right" have a reasonable belief that they have made an economic investment which cannot be legislatively regulated or the value of which cannot be legislatively diminished without fair compensation from the government. However, even by the time modern-day economic regulation had reached its adolescence, this Court had begun to recognize that the Takings Clause "cannot be pressed to its grammatical extreme; . . . that some play must be allowed to the joints if the machine is to work." *Tyson & Bros. v. Bantam,* 273 U.S. 418, 446 (1927) (Holmes, J., dissenting). And even where there is some legitimate property right at stake, the Court has most recently acknowledged that "[r]egulation of property rights does not 'take' private property when an individual's reasonable investment-backed expectations can continue to be realized as long as he complies with the reasonable regulatory restrictions the legislature has imposed." *Locke, supra,* 105 S.Ct. at 1799. Thus, loss of future profits or a mere lessening of value resulting from governmental regulation of economic relationships have not been viewed as interference with investment-backed expectations. *See, Andrus v. Allard,* 444 U.S. 551 (1979); *Jacob Rupert, Inc. v. Caffey,* 251 U.S. 264 (1920).[26]

So, too, where an employer has voluntarily entered into a relationship requiring his participation in a multi-employer pension plan the fact that his withdrawal from the plan may result in the imposition of certain financial liabilities is no different than any other obligations which the employer might incur as the result of the wide range of governmental actions which regulate the conduct of

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[26] The Court has said that if permissible regulations so severely impair a business' profit-making capacity, that the business is free to cease operating; there is no taking. *Erie RR Co. v. Bd. of Public Utility Comrs.,* 254 U.S. 394 (1921), cf. *Brooks-Scanlon Co. v. RR Commission,* 251 U.S. 396 (1920).

the employer's business. Indeed, one of the risks of entrepreneurship is that some day the bills may be larger than anticipated or that there might not be enough money in the accounts to pay all the bills. But, conversely the driving force which causes the entrepreneur to take the risk is the possibility that there are profits to be made.

Appellants assert that the enactment of the MPPAA upset all of their reasonably held expectations that the only employer obligation to a multiemployer plan is to make contributions to the plan during the life of the collective bargaining agreement. Whenever the agreement to make contributions is extinguished, say Appellants, any additional financial obligations imposed by the government constitute an interference with what they had earlier bargained for. But this Court has already visited—and rejected—Appellants' argument. *R. A. Gray, supra,* 104 S.Ct. at 2718-19. When ERISA was enacted in 1974, withdrawn employers were made subject to the imposition of contingent liability. *R. A. Gray, supra,* 104 S.Ct. at 2270. The Administration recommended the MPPAA and the Congress enacted it for the simple reason that the prior regulatory scheme was not working as it was designed to work. To correct the deficiencies in the earlier law, Congress merely strengthened the regulatory framework which it found was not having the desired effect.

Nor can it be said that employers had reason to expect that the private retirement income security system was an area of regulation which is static or which had just arisen in 1974. Pension plans had been the subject of changing Federal regulation since at least 1921 when Congress provided favorable tax treatment to foster the growth and development of these vital programs in the private sector. IRC § 401 (1954); IRC §165 (1939); IRC § 219 (1921); *see also, Peick, supra,* 539 F. Supp. at 1044-45. During the Second World War, pursuant to its authority under the Emergency Price Control Act, the National War Labor Board was empowered to, and did in fact, require certain employers to maintain without

alteration their existing pension plans. *See Western Union Co. Case No. 2516-CS-D* (N.W.L.B., January 18, 1943) and *Philadelphia Transportation Co. Case No. 3056-AR* (N.W.L.B., February 11, 1943).[27] By 1948 it was well established that pension benefits were a mandatory part of collective bargaining under the National Labor Relations Act and that the refusal to bargain over such benefits could subject an employer to the severe economic consequences of a work stoppage. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950). And section 302 of the Labor Management Relations Act of 1947 as well as the Welfare and Pension Plans Disclosure Act of 1958 afforded additional clear warning to employers that the federal government might one day act again to regulate in this economic sphere.[28]

It is also not persuasive that many of the collective bargaining agreements establishing an employer's obligation to contribute to a multiemployer plan may have provided that there was no addtional such contribution obligation once the contract terminates. "One whose rights, such as they are, are subject to state restrictions cannot remove them from the power of the State by making a contract about them." *Hudson Co. v. McCarter*, 209 U.S. 349, 357 (1908). That very same principle is reflected in ERISA's regulation of the conduct of pension

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[27] See *The Termination Report of the National War Labor Board, Industrial Dispute and Wage Stabilization in Wartime*, Vol. 1, p. 384, Government Printing Office, 1947.

[28] Even if there had been no history of legislative regulation in this area, that would not make the act unconstitutional. In *Federal Power Comm'n v. Nat'l Gas Pipeline*, 315 U.S. 582, 583 (1942), a statute regulating wholesale gas prices was challenged on Takings Clause grounds. The Court upheld the statute saying, "the business of cross-petitioners is not any the less subject to regulation now because the government has not seen fit to regulate it in the past." *Ibid*, at 683. *Cf. Nebbia v. New York*, 291 U.S. 538 (1934).

plan fiduciaries who, once the statute was enacted, were prohibited from relieving themselves from their fiduciary responsibilities by virtue of exculpatory clauses in the trust instruments. 29 U.S.C. § 1110.[29] This change in a fiduciary's status could well result in the imposition of significant personal liability in the event of a breach of the fiduciary's ERISA duties. And the liability could arise even though the fiduciary breach was the result of an unintentional error or omission. Nonetheless, the government's longstanding regulation of trust duties negates any argument that trustees could reasonably expect to continue to exculpate themselves from liability in the face of ERISA's carefully reticulated regulatory scheme.[30]

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[29] The traditional practice, prior to ERISA, had been for trustees to insulate themselves from liability for breach of fiduciary duties. Congress believed that fiduciaries would adhere to the strict requirements under ERISA if exculpatory clauses were made void under the statute. Congress did permit fiduciaries to purchase insurance to cover liability or losses resulting from their acts or omissions.

[30] The appellants attempt to draw an analogy between withdrawal liability and the interests of creditors holding property rights in collateral, citing *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). But the expectation to be free from liability (whether contracted for or not) is not at all similar to a title in property, a vested security interest. The 7th Circuit put it most aptly in *Peick v. PBGC*, 724 F.2d 1247, 1276 (7th Cir. 1983) *cert denied*, —— U.S. ——, 104 S.Ct. 3554 (1984):

> The contractual rights of the employers in the case before us are in no way analogous to the type of rights in specific property protected under the takings clause. Appellants identify no interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans in which they participate. Because this contractual right in no way constitutes a type of distinct and identifiable "property", we need not even reach the question of whether there was a "taking" in this case.

4. *"Justice and Fairness" are an Integral Element of Withdrawal Liability and the MPPAA's Overall Regulatory Scheme.*

Another approach of the Court under the Takings Clause has been to preserve government's power to regulate "subject only to the dictates of justice and fairness." *Andrus v. Allard, supra,* 444 U.S. at 65. Utilizing "the exercise of judgment," *id.*, in this case compels the conclusion that there is no unconstitutional government conduct here.

Congress' purpose in enacting the MPPAA has been amply demonstrated herein. The imposition of withdrawal liability is but one element of an overall system designed to protect the totality of multiemployer plan interests. And "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

To the extent that withdrawn employers are required to pay a certain share of the unfunded vested obligations of a plan, it is clear that Congress went to great lengths to moderate the impact of such payments and to make the calculations of any amounts ultimately found to be due bear a reasonable relationship to the withdrawn employer's participation in the plan. Indeed, although Appellants complain that employer liability is sometimes "substantial", it is hard to imagine that Congress would have enacted a mechanism which on the one hand would protect the multiemployer retirement system while at the same time intending to destroy the entire fabric of American business.[31] But even if that were the reality, "[t]hat the

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[31] Appellants' pleas in this regard appear a bit like Aesop's shepherd boy who cried "Wolf, Wolf." Indeed, the National Association of Manufacturers in its Amicus brief in this case takes great care to emphasize that the vast majority of all multiemployer plans are financially sound. Brief of Nat'l. Assoc. of Manufacturers as Amicus Curiae in support of appellants, at pp. 9-10. Thus, not only has the MPPAA's overall regulatory scheme succeeded in its purpose but its economic impact is hardly as ruinous as Appellants assert.

[Congress] might be so foolish to kill a goose that lays gold eggs for them has no bearing on their constitutional rights." *Erie Ry. Co. v. Bd. of Public Utility Comm'rs*, 254 U.S. 394, 410 (1927). Moreover, "whether *in fact* [MPPAA] will accomplish its objectives is not the question: the [Takings Clause] is satisfied if . . . the [Congress] *rationally could have believed* that [the withdrawal liability provisions] would promote [MPPAA's] objective. *Western & S.L.I. Co. v. Bd. of Equalization*, 451 U.S. 648, 672 (1981).

CONCLUSION

For the foregoing reasons, the NCCMP urges this Court to affirm the decision of the Three Judge Court in this case.

Respectfully submitted,

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